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REPORTS

OF

CASES DECIDED

BY THE

ENGLISH COURTS.

WITH

NOTES AND REFERENCES TO KINDRED CASES AND AUTHORITIES,

BY

NATHANIEL C. MOAK,
COUNSELLOR AT LAW.

VOLUME I.

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PREFACE.

This series of Reports will include all the cases believed to be of value in this country, in the various Courts of England, without abridgment and in full as reported by the English reporters, commencing with the numbers for the year 1872.

The English Consolidated Reports are published, in England, in numbers, giving the cases in each court under the following titles:

LAW REPORTS, ADMIRALTY AND ECCLESIASTICAL, cited L. R. Adm. & Ecc.
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LAW REPORTS, SCOTCH AND DIVORCE APPEALS, cited L. R. Scotch and Div. App.

A great proportion of the cases involve questions of a purely local character, and are not of the slightest value in this country. The volumes are expensive, and occupy a much greater space than if only the cases of value here were reported together as soon as those in the series would complete a volume. The profession will thus be saved the time which would be occupied in the examination of cases found to be valueless, and will only be compelled to pur-

chase what is of actual value to them. Not more than two or three volumes per year will be required. Owing to the number of cases included in the present volume it was found impracticable to include those in the House of Lords and the Privy Council but they will be given in the next. The present series will also contain all the cases of value here reported in the *Weekly Reporter*, the *Law Times Reporter*, the *Law Journal Reports* and *Cox's Criminal Cases* not included in the regular Reports. The cases therein during the period covered by the present volume will be given in the next. As two of these are published weekly and give cases much in advance of the regular reports, it not unfrequently happens that the opinion on the reversal of a case is published in them before that of the court below in the regular reports. The reporting in the present series, of cases reversed, will thus frequently be avoided.

It will readily be seen that these Series will possess an advantage over any one of the English.

Brief references to American cases of a character kindred to those reported will be given.

The marginal paging of the original English Report is retained, and it is suggested that in citations, in order at once to show the Court, it be also used, thus:

Head v. Tattersall, 1 Eng. Rep., 140, L. R., 7 Exch., 7.

NATHANIEL C. MOAK.

ALBANY, *July* 1872.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXV VICTORIA.

Nov. 17, 1871.

JENNER and another v. A'BECKETT.

Law Reports, 7 Queen's Bench, 11.

Libel — Defamation as to Goods manufactured by Plaintiff — Action, when maintainable.

Declaration, that the plaintiffs were manufacturers of bags, and manufactured a bag which they called the "Bag of Bags," and the defendant printed and published, concerning the plaintiffs in their business, the words following: — "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam:" —

Held, on demurrer, by Mellor and Hannen, JJ., that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism.

By Lush, J., that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business.

DECLARATION that the plaintiffs carried on the business, [11 amongst other businesses, of manufacturers of bags, and in such business invented, manufactured, and sold for gain and reward in that behalf great numbers of a certain bag called the "Bag of Bags," and the defendant, well knowing the premises, maliciously printed and published of and concerning the plaintiffs

in their said business, and of and concerning them in the manufacturing and selling of the said bags, in a certain periodical or paper called *The Tomahawk*, the false and defamatory words following:—"Novelty and enough. Let us premise our remarks by declaring that they are not a planned advertisement, and then let us declare that Messrs. Jenner and Knewstub" (meaning the plaintiffs), "of St. James's Street, have introduced and largely advertised an article of their manufacture as the Bag of Bags" (meaning the said bag so manufactured and sold by the plaintiffs). "As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam."

Demurrer, and joinder in demurrer.

Joyce (*Steele* with him) in support of the demurrer. The 12] words set *out in the declaration are not libellous. There is no imputation on the character of the plaintiffs; the language applies to the name of an article manufactured by them. If the words are defamatory, they disparage a chattel, and are to be governed by the rule applicable to slander of title; no action for which lies without special damage: *Malachy* v. *Soper* (1). Here there is no averment that special damage has been sustained. *Evans* v. *Harlow* (2) is a strong authority that the action will not lie. This case shows that a mere reflection on goods manufactured by a tradesman is not actionable; there must be something more; it must appear that the publication of the libel has prevented a sale of the goods, or has been otherwise injurious, either to the character or the business of the tradesman.

Parry, *Serj.* (*J. O. Griffits* with him), contra. The cases cited are not in point. *Malachy* v. *Soper* (1) was a case of slander of title; in *Evans* v. *Harlow* (2), the defamatory words reflected on the utility of the goods manufactured by the plaintiff; here the imputation is on the conduct of the plaintiffs in giving a particular name to an article manufactured by them; and under the guise of slandering the bag, the defendant slanders the manu-

(1) 3 Bing. N. C., 371. (2) 5 Q. B., 624.

facturer. The question ought to be considered by a jury, whether the language used was not intended in an ironical sense, and whether the defendant did not mean to imply that the bag was neither portable, elegant, nor useful; and if this were so, intending purchasers would be deterred from buying it. Further, these words are actionable on the ground that they throw discredit upon a commodity in which the plaintiffs deal: Starkie on Slander, 3d ed., p. 161. And this case is governed by the principle on which it has been held actionable to say of a bookseller that he is in the habit of publishing immoral and foolish books: *Tabart* v. *Tipper* (1).

[MELLOR, J., referred to *Campbell* v. *Spottiswoode* (2).]

Joyce, in reply.

MELLOR, J. I regret that a difference of opinion as to this declaration exists upon the bench; and I may say, that in some portion of the language complained of, if defamatory at all, conveys an imputation *so slight, that if this portion alone [13 had been used, the plaintiffs would have no case to lay before a jury. The words to which I refer are these: — "As we have not seen the 'Bag of Bags,' we cannot say that it is useful, or that it is portable, or that it is elegant; all these it may be." If the writer had stopped there, I should have thought that those words could not be actionable without some allegation that they were intended and calculated to convey an impression that the bag was not portable, or useful, or elegant; and if no more had been alleged, I should have been indisposed to think that the declaration disclosed a cause of action. But we must consider the succeeding words, which are as follows: — "But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public ad nauseam." This may be a fair criticism on the conduct of the plaintiffs in giving such a title as "Bag of Bags" to an article sold by them; but I cannot help thinking that it is for a jury, and not for the Court, to consider whether these words do or do not go beyond the limits of fair criticism. The jury may think that this bag has been advertised ad nauseam, and that the object of giving it the name above mentioned is to attract buyers in a manner

(1) 1 Camp., 350. (2) 3 B. & S., 769; 32 L. J. (Q. B)., 185.

that is, perhaps, untradesmanlike. I believe that if they take this view they will deem the criticism fair, and therefore justifiable. But I cannot say, as a matter of law, that the words do not convey an imputation upon the plaintiffs' mode of carrying on their business, and do not in effect allege that they have done a silly, slangy, and vulgar act. A jury may think this language calculated to bring the plaintiffs into odium, and to disparage them in the opinion of the public in respect of the manner in which they conduct their business. I should be glad to see my way to a different conclusion, because actions of slander and libel, unless they are brought in respect of a serious charge, are not to be encouraged; but I cannot say that the declaration does not set forth matter for the consideration of a jury; and I cannot, on demurrer, hold that the defendant is entitled to succeed.

Lush, J. I cannot bring my mind to the conclusion that any part of the language complained of can be considered libellous. 14] I *think that the Court, before giving judgment for him, is bound to see that the words are capable of casting an imputation upon the character of the person complaining, or upon his conduct in carrying on his trade; and the imputation must be of a kind likely to injure him in public estimation, or to injure him in his trade. If the words, fairly read, are not capable of the above-mentioned construction, I think it the duty of the Court to hold that they ought not to be submitted to a jury. I am unable to see in the words of the alleged libel any imputation on the character of the plaintiffs, or on the mode in which they carry on their business. The subject of the alleged libel is an article which the plaintiffs have advertised as of their manufacture, and to which they have given the title of "The Bag of Bags." Now, it is competent to every member of the community to express his opinion as to the good taste of giving that title to the article. It has been contended that the first part of the libel may turn out to have been used ironically, and is, moreover, capable of conveying to the public the impression that the bag is not useful, not portable, and not elegant. Even if some of these words be capable of being used ironically, I fail to see that any person can reasonably interpret them in that sense, when the writer states that he has not seen the bag, and

therefore cannot say that it is neither useful, nor portable, nor elegant, and that it may have all these qualities. It would do violence to language to say that these words were used ironically, that the writer had seen the bag, and that he intended to describe it as neither useful, portable, nor elegant. If the jury should find that to be the meaning of the words, I should hold the verdict to be wrong. I cannot say there is any imputation upon the bag.

It is necessary to consider the remainder of the alleged libel, which is as follows:—"But the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public ad nauseam." Can it be held to be libellous upon a person, to say that the title given by him to an article of his manufacture is silly, slangy, and vulgar? It is entirely a matter of taste and of opinion. The title of an article may be silly, slangy, and vulgar in the estimation of one person, and not in the estimation of another. At all *events, the writer of this passage [15 sets out the words upon which he comments, and gives every opportunity of judging whether he is justified in his criticism. If this passage is libellous, it seems to me it would be libellous for any critic to say of a book, a poem, or a drama, "The title which the author has thought fit to give to his work is silly, slangy, and vulgar." In my opinion that would be a very dangerous extension of the law of libel.

HANNEN, J. I am of opinion that, upon this declaration, there is a question to be left to the jury, and that they have to determine whether or not the language used is only a fair criticism, or whether this passage was written with the intention of unduly disparaging the plaintiffs. It seems to me that much may be said in support of the argument, that these words are not written as a fair criticism, but are intended to injure. The title of an article sold by a tradesman does not usually attract the attention of critics, and it may be thought that the defendant was induced by some motive other than a regard for good taste to notice the name that had been given to an article of commerce. The writer says, "The title we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public ad nauseam." It is for the jury, taking

into their consideration all the circumstances, to say whether or not it was intended to disparage the plaintiffs in the conduct of their business.

Judgment for the plaintiffs.

Attorneys for the plaintiffs: *Hughes & Son.*
Attorneys for defendant: *Evans, Laing & Eagles.*

Nov. 17, 1871.

WILSON v. NEWBERRY.

Law Reports, 7 Queen's Bench, 31.

Negligence — Action — Pleading — Insufficiency of Declaration.

Declaration, that the defendant was possessed of yew trees, the clippings off which he knew to be poisonous, and that it was the duty of the defendant to prevent the clippings from being placed on land not occupied by him: that the defendant took so little care of the clippings that the same were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned: —

Held, on demurrer, that the declaration disclosed no facts from which a duty could be inferred in the defendant to take care of the clippings.

Fletcher v. *Rylands* (Law Rep. 3 H. L., 330), distinguished.

DECLARATION, that the defendant was possessed of certain yew
31] trees, then being in and upon certain lands of the defendant, in his occupation, the clippings off which said yew trees were, to the knowledge of the defendant, poisonous to horses and cattle; whereupon it became and was the duty of the defendant to take due and proper care to prevent the said clippings off the said yew trees from being put or placed in and upon land other than land of the defendant, or in his occupation, where the horses and cattle of his neighbors and others might be enabled to eat them, and the plaintiff says that the defendant, disregarding his duty in that behalf, did not take due and proper care to prevent the said clippings off the said yew trees from being put and placed in and upon land other than land of the defendant or in his occupation, where the horses and cattle of his neighbors and others might be enabled to eat them, but, on the contrary, took so little, bad, and improper care of the said clippings off the said yew trees, that the

same were put and placed in and upon land other than land of the defendant, or in his occupation, whereby the horses of the plaintiff being upon land where they lawfully might be, were enabled to eat the said clippings off the said yew trees, and did eat of the same, and were thereby poisoned and killed, whereby the plaintiff lost the value of the said horses, and has been otherwise damnified.

Demurrer, and joinder in demurrer.

Herschell, in support of the demurrer. The declaration is bad. The duty alleged does not follow from the facts stated in the *declaration. It does not charge that the defendant put the [32 yew tree clippings on the land of the plaintiff. It does not appear who clipped the yew trees. A trespasser may have clipped the trees, and by his act the clippings may have been placed at the spot where they were eaten by the plaintiff's cattle. This case is distinguishable from *Fletcher* v. *Rylands* (1). That case decided that the person who, for his own purposes, brings on his land and keeps there anything likely to do mischief, must take care of it at his peril, and is answerable for the natural consequence of its escape. That doctrine has no application here.

Quain, Q. C. (*A. L. Smith* with him), contra. The declaration is good. This is an action for negligence, and by the demurrer the negligence is admitted, and the admission of negligence discloses a cause of action to be tried by a jury. The declaration charges not an absolute duty to take care of the clippings, but only a duty to prevent them from getting off the defendant's land. The plaintiff is entitled to succeed on the principle laid down in *Fletcher* v. *Rylands* (1). The defendant had poisonous matter on his land, which he is bound to take care of, and he is liable to make compensation for the damage caused by its escape.

Herschell was not heard in reply.

Mellor, J. I am of opinion that this declaration is bad. The duty alleged does not result from the facts stated. The facts upon which this duty is said to be founded are these: the defendant was possessed of certain yew trees then being in and

(1) Law Rep. 3 H. L., 330.

upon certain lands of the defendant in his occupation, the clippings off which yew trees were, to the knowledge of the defendant, poisonous. These are the only facts from which the duty charged is to be inferred, and it is alleged in the following terms:—"Whereupon it became and was the duty of the defendant to take due and proper care to prevent the said clippings off the said yew trees from being put or placed in and upon land other than land of the defendant, or in his occupation, where the horses and cattle of his neighbors and others might be enabled to eat them." Now, it is not alleged that the defendant clipped the yew trees; it is not alleged that he knew the yew trees were clipped; and it is not alleged that he 33] had *anything to do with the escape of the yew clippings on to his neighbor's land. It is quite consistent with the averments of this declaration that the cutting may have been done by a stranger without the defendant's knowledge. I cannot think that the duty charged can be deduced from the facts stated; and therefore, in my opinion, the declaration is bad.

The case of *Fletcher* v. *Rylands* (1) has no analogy to this case. The foundation of the doctrine there laid down is derived from an old case in Salkeld (2), in which it was determined that it was the duty of a man to keep his own filth on his own ground. If a person brings on to his own land things which have a tendency to escape and to do mischief, he must take care that they do not get on to his neighbor's land. This is a very different proposition from that which has been contended for on behalf of the plaintiff; it is that where a person has yew trees growing on his land which are clipped by some means, he must prevent the clippings from escaping on to his neighbor's land, and from being placed there by a stranger. I do not think that the facts alleged cast any duty of this kind upon the defendant.

LUSH and HANNEN, JJ., concurred.

Judgment for the defendant.

Attorneys for plaintiff: *Plews & Irvine.*
Attorneys for defendant: *Reed, Phelps & Sedgwick.*

(1) Law Rep. 3 H. L., 330.

(2) *Tenant* v. *Goldwin*, 1 Salk., 360.

See *Fisher* v. *Clark*, 41 Barb., 329; *Mills* v. *N. Y.* etc., 2 Robertson, 326; 41 *N. Y.*, 619; *Cooke* v. *Waring*, 2 Hurl. and Colt., 332; 3 Pars. Cont., 223, citing *Barnum* v. *Vandusen*, 16 Conn., 200; Moak's notes to Clarke's Ch., 351, ed. 869.

Nov. 18, 1871.

JOYCE and others v. KENNARD.

Law Reports, 7 Queen's Bench, 78.

Marine Insurance — Construction of Policy — Insurance of Liability as Carriers — Mode of estimating Underwriters' Liability.

The plaintiffs, J. & Son, were lightermen, and effected an insurance in the form of an ordinary Lloyd's policy, at and from all wharves on the Thames, from Wandsworth to the Victoria Docks, which contained the following clause: — "To cover and include all losses, damages, and accidents amounting to 20*l.* or upwards in each craft, to goods carried by J. & Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents J. & Son may be liable or responsible to the owners thereof, or others interested." The policy was subscribed by different underwriters for different sums amounting to 2000*l.*, and the defendants underwrote the policy for 100*l.* A loss happened to goods carried by the plaintiffs in a barge, for which the plaintiffs became liable to those interested in the goods to the amount of 1100*l.* The total value of the risks of the plaintiffs in this and other barges at the time of the loss and covered by the policy amounted to 20,000*l.*: —

Held, that, on the construction of the policy, the plaintiffs were entitled to be indemnified for the loss actually sustained, viz., 1100*l.*, and to recover from the defendant 55*l.*, his proportion; and that the sum to be recovered was not merely such a proportion of the plaintiffs' loss as the sum for which the defendant subscribed the policy, viz., 100*l.*, bore to the value of all the goods afloat and covered by the policy at the time of the loss, viz., 20,000*l.*

CASE stated without pleadings.

The plaintiffs are lightermen, and the defendant is an underwriter. In the month of October, 1869, the plaintiffs [78 caused a policy of insurance to be effected on their behalf.

The policy in point of form was the ordinary Lloyd's policy, adapted to the particular risk. The words of the policy were "lost or not lost at and from all or any of the wharves, banks, quays, and places of arrival or departure in the river Thames, and any merchant or steam vessel of any description therein comprising the whole extent of the said river from Wandsworth downwards to *the Victoria Docks, including all or any [79 intermediate docks and wharves, and vice versa, until on board any merchant or steam-vessel, barge, or boat, or otherwise, landed at any wharf, &c. The risk to commence on the 25th of September, 1869, and to terminate on the 24th of September, 1870, including both days, upon any kind of goods and merchandise . . . in craft of any description . . . the adventure begin-

ning upon the said goods and merchandise from the loading thereof aboard the ship as above, . . . and so continue and endure during her abode there upon the said ship, &c., and, further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandise whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandise until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage, to proceed and sail to and touch and stay at any ports and places whatsoever and wheresoever in the river Thames, from Wandsworth to the Victoria Docks and vice versa. The ships, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy are and shall be valued at on all goods and produce as interest may appear." The sum stated in the margin was 2000*l.* The premium was 70*s.* per cent. and at the bottom of the policy, in writing was the following clause: — "To cover and include all losses, damages, and accidents amounting to 20*l.* and upwards, in each craft to goods carried by Messrs. Joyce, as lightermen, or delivered to them to be waterborne, either in their own or other craft, and from which losses, damages, and accidents, Messrs. Joyce may be liable or responsible to the owners thereof, or others interested. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription."

This policy was subscribed by different underwriters for different sums, amounting in the whole to 2000*l.*

The defendant underwrote the policy for 100*l.*, and received by way of premium the sum of 3*l.* 10*s.*

On the 7th of December, 1869, and during the continuance of the risk covered by the policy, a loss, damage, and accident, within the meaning of the policy, happened to goods carried by
80] the plaintiffs *as lightermen, in a craft called the *Lord Cardigan*, and for which loss the plaintiffs have become liable and responsible to the owners and others interested in the goods, to the sum of 1100*l.*, and have paid that amount.

It is agreed that the total value of the risks of the plaintiffs in this and other barges employed by the plaintiffs at the time of the loss, and which were covered by the policy, amounted to

the sum of 20,000*l.*, and upwards. The total value of the goods in the barge *Lord Cardigan* at the time of the loss was 2906*l.*

The plaintiffs contend that upon the true construction of the policy they are entitled to be indemnified for the loss actually sustained, viz., 1100*l.*, and to recover from the defendant 55*l.* as his proportion of such loss.

The defendant contends that under the policy the plaintiffs are only entitled to recover from the defendant such a proportion of their loss as the sum for which the defendant subscribed the policy, viz., 100*l.*, bears to the total value of all the goods on board all the plaintiffs' craft which were between the limits mentioned in and which were covered by the policy at the time of the loss; and they have paid into court the sum of 6*l.*, which is admitted to be sufficient to satisfy the plaintiffs' claim, assuming this contention to be correct.

The defendant further contends, that, in any view, the plaintiffs are not entitled to more than such proportion of the loss, as 100*l.*, the sum insured, bears to the total value in the barge, viz., 2906*l.*

The Court was to be at liberty to draw all inferences of fact which a jury ought to have drawn.

The question for the opinion of the court was, which of the principles above referred to is the proper principle upon which the amount to be recovered by the plaintiffs ought to be settled.

Quain, Q. C. (*A. L. Smith* with him), for the plaintiffs. The question is, what is the nature of the risk intended to be covered by the policy? This is not an ordinary marine risk, but the policy is intended to cover all losses and damages for which the plaintiffs may be liable to the owners of the goods delivered to them to be carried, and which are being carried by the plaintiffs within the limits of the policy. The subject-matter of the policy is the *liability of the plaintiffs, as carriers, to the [81 owners of goods entrusted to them: for the words which govern the whole clause are "for which losses, damages and accidents, Messrs. Joyce may be liable or responsible to the owners thereof, or others interested." It is clear, therefore, that the parties intended that the policy should indemnify the plaintiffs to the extent of 2000*l.* for any loss which they might sustain as carriers in their trade, and for which they would be liable

over to the owners of the goods. *Crowley* v. *Cohen* (1) will be relied upon on the other side, and it will be said on the authority of that case that the defendant is only liable to such a proportion of the loss as 100*l.*, the sum for which the defendant has subscribed the policy bears to 20,000*l.*, the total value of goods then being carried by the plaintiffs; but that case has no application; the policy there covered an ordinary canal navigation risk, and was construed to be a policy attaching upon the goods upon all the boats at a given time. Here, by express words, the insurance is upon all losses for which the plaintiffs are liable: the plaintiffs are therefore entitled on this policy to recover 1100*l.*, and the policy remains in force to cover 900*l.* more if there should happen to be a further loss. In *Wilson* v. *Jones* (2), the risk was upon the adventure — the laying down safely of an electric cable; here it is upon the liability of the carriers to make good the loss of goods to the owners.

Sir G. Honyman, Q. C. (*Watkin Williams* with him), for the defendant. The question is, what construction is to be put on the words of this policy? There is a distinction between a contract of marine insurance and fire insurance. In a fire insurance if goods valued at 20,000*l.* be insured for 1000*l.*, and a loss to the extent of 1000*l.* occurs, the insurer is liable for that amount; but with regard to a marine insurance, if goods to the value of 20,000*l.* are insured for 1000*l.*, and a loss occurs, it is necessary to ascertain what proportion the goods loss bear to the whole value, for the owner of the goods is his own insurer for 19,000*l.* In this case, therefore, the true measure of liability is the proportion which 100*l.* bears to the value of all the goods afloat at the time of the loss, and that is stated in the case to be 20,000*l.* Then it is said, that principle does not apply 82] because the words of the policy are *"to cover all losses for which they may be responsible to the owners;" these words do not alter the extent of the liability of the underwriters, they are intended to describe the subject-matter of the insurance, and do not contravene the well-known principle that an underwriter undertakes to underwrite to the amount of the loss only in such a proportion as his subscription bears either to the value of the policy, if a valued policy, or to the total value of the risk, if an open policy. The insertion of 2000*l.* in the

(1) 3 B. & Ad., 478. (2) Law Rep. 2 Ex., 139.

margin of the policy does not make it a valued policy; it is done merely for the purpose of fixing the stamp. There is nothing to distinguish this case from *Crowley* v. *Cohen* (1). In both cases the policy was effected by a lighterman to cover the risk which he ran, and the Court say that the ordinary principle of calculating the loss upon a marine insurance is to be applied in calculating the loss on the policy in that case. Applying the principle laid down in *Wilson* v. *Jones* (2), the clause in question is inserted not for the purpose of settling the extent of the underwriter's liability, but to show what is the subject-matter of the insurance, and that it is the goods in which the plaintiffs are interested as carriers.

Quain, *Q. C.*, was heard in reply.

MELLOR, J. I am of opinion that our judgment should be for the plaintiffs. This is not strictly a marine insurance; it is a contract by which the defendant indemnifies the plaintiffs against any liability which they may incur as carriers to the owners of the goods entrusted to them, and we must construe the words which have been used according to their ordinary meaning, and their meaning is that for which the plaintiffs contend.

LUSH, J. I am of the same opinion. This is an exceptional policy, and we have only to construe the language used; and when I look at the position of the plaintiffs and find that they are carriers upon the river, I cannot doubt the intention of the parties. The object of the plaintiffs was to secure an indemnity against any loss in whole or in part which they might sustain as carriers, and it is not a mere policy on goods. A case may be supposed in which the goods have perished and yet the underwriters might not be liable *on this policy. The [83 subject-matter insured against is the liability which the plaintiffs would sustain in respect of the goods by reason of their accepting them as carriers. I cannot interpret the words of the policy in any other sense than as importing that the underwriters undertook to be responsible to the extent of their subscriptions for all the losses, which the plaintiffs might sustain in respect of those goods, and for which they would be liable

(1) 3 B. & Ad., 478. (2) Law Rep. Ex., 239.

to the owners. The language has that meaning, and I do not entertain a doubt that that is what the parties intended. It is not an ordinary marine policy, but a policy of a mixed nature, the object of which was to secure to the plaintiffs an indemnity to the extent of the sum subscribed for, for any loss during the year which they might sustain by reason of their being responsible as carriers for the loss of the goods.

HANNEN, J., concurred.

Attorneys for plaintiffs: *Plews & Irvine.*
Attorneys for defendant: *Parker & Clarke.*

Dec. 11, 1871.

116] *HANNAFORD and others v. HANNAFORD and another.

Law Reports, 7 Queen's Bench, 116.

Devise — Construction of Will — Cross Remainders.

A testator devised an estate, of which he died seised in fee, to his brother, W. H., for life, and after the decease of W. H., to the four sons of W. H., his nephews, for life as tenants in common; and after their decease he devised the share or shares of his said nephews respectively to their respective eldest sons, then living for life; and after the decease of such eldest sons to the first and other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, and other sons, then living, of his said nephews severally and successively, according to their respective seniorities, and to their issue in tail male in the same manner and for the same estate and estates as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all and every the sons of his nephews hereafter to be born in tail male. After which the will proceeded thus: "And for default of such issue, I give and devise the same to my own right heirs for ever, it being my will and intention that the said lands shall go and remain in my name and family for ever, or so long as the law will permit such enjoyment of the same":—

Held, that the clause in favor of the heirs general did not take effect so long as any issue of any of the devisees capable of taking as tenants in tail survived, and that cross remainders were to be implied in favor of surviving tenants in common.

CASE stated after writ.

The action was brought to recover land situate at Abbott's Kerswell, in the county of Devon, whereof John Hanna-

ford was at the time of his decease seised in fee. The facts of the case, and the material parts of the will of John Hannaford, are fully stated in the judgment of the Court.

Nov. 14. *Philbrick*, for the plaintiffs.
J. Brown, *Q. C.* (*Atkinson* with him), for the defendants.

The following authorities were cited: *Cook* v. *Gerrard* (1); Notes to Saunders' Reports, vol. i, p. 176; *Livesey* v. *Harding* (2); *Cooper* v. *Jones* (3); *Powell* v. *Howells* (4); Jarman on Devises, vol. ii, pp. 510–526.

Cur. adv. vult.

*Dec. 11. The judgment of the Court (Cockburn, C.J., [117
Mellor, Lush, and Hannen, JJ.), was delivered by

COCKBURN, C.J. The question in this case arises on the construction of the will of John Hannaford, who died on the 11th of February, 1833.

By his will, dated the 20th of February, 1830, the testator devised an estate, of which he afterwards died seised in fee, to his brother, William Hannaford, for life, and after the decease of the latter, to the four sons of the said W. Hannaford, his nephews, for life, as tenants in common; and after their decease he devised the share or shares of his said nephews, respectively to their respective eldest sons "now living" for life; and after the decease of such eldest sons he devised the share or shares of each of such eldest sons to the first and other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, and other sons, "now living," of his said nephews, severally and successively, according to their respective seniorities, and to their issue in tail male, "in the same manner and for the same estate and estates" as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all and every the sons of his said nephews, "hereafter to be born, in tail male." After which the will proceeds thus:—"and for default of such issue, I give and devise the same to my own right heirs forever, it being my will and inten-

(1) 1 Wms. Saund., 185.
(2) 1 Russ. & My., 636.
(3) 3 B. & A., 425.
(4) Law Rep., 3 Q. B., 654.

tion that the said lands shall go and remain in my name and family for ever, or as long as the law will permit such enjoyment of the same."

The testator having died in 1833, William Hannaford, the first devisee for life, took possession and enjoyed the estate till his death in 1838. His four sons, the testator's nephews, referred to in the will, survived their father. William, the eldest, died in 1844, leaving a son and three daughters. The son, William Field Hannaford, died in 1863, never having had any issue. The second son, George Hannaford, died in 1868, having also had no issue. The third son, Peter Hannaford, died some time since, leaving two sons. Of these the eldest, William Pitts Hannaford, went to sea, being then unmarried, and not having been heard of for eleven years, is presumed to be dead. 118] The other, Henry Hannaford, *is now living. The fourth nephew mentioned in the will, Thomas Pitts Hannaford, died, leaving two sons, the eldest of whom has also since died, leaving a son, Norman Field Hannaford, who, as heir in tail, of course succeeds, as tenant in common, to one-fourth of the subject-matter of the devise.

The dispute in the present case relates to the shares of the testator's two nephews William and George, as to whom there has been a failure of male issue. The plaintiffs are the daughters of the eldest nephew, William, and claim under the final clause of the devise in favor of the testator's right heirs in default of male issue of the devisees under the will; contending that on failure of issue of either of such devisees the clause in question takes effect in respect of his share. On the other hand, the defendants, Henry Hannaford, and Norman Field Hannaford, who, as has been shown, are the heirs of two of the testator's nephews mentioned in the will, contend that the effect of the limitations of the will is to create by implication cross-remainders between the devisees and their respective heirs, and that consequently, they are entitled, as tenants in common, to the shares of the two nephews whose male issue have failed.

At the close of the argument on the case, we were strongly disposed to think that the contention of the defendants was right; but the parties having agreed, on account of the smallness of the property in dispute, to abide by our decision as final, we thought it right to take time for further consideration of

the language of the will, and to enable us to look into the authorities bearing on the subject. The result is that our first impression is confirmed, and that we are now satisfied that our judgment should be for the defendants.

The will in question, however complicated and clumsy may be its language, amounts to no more than a devise, after the determination of the life estates, to the issue of the nephews, in tail male, as tenants in common, with a remainder in default of issue to the right heirs of the testator. Now, the law appears to be at the present day perfectly well settled, that, upon such a will, the clause in favor of the heirs general does not take effect so long as any issue of any of the devisees, capable of taking as tenants in tail, survive, and that under such a will cross-remainders must be implied in favor of surviving tenants in common.

After a review of all the cases on the subject, Mr. Jar- [119
man (2 Jarman on Wills, 526) draws from them the following conclusions: — First, "that under a devise to several persons in tail, being tenants in common, with a limitation over for want or in default of such issue, cross-remainders are to be implied among the devisees in tail;" secondly, "that this rule applies whether the devise be to two persons or a larger number, and though it be made to them "respectively."

In the case of *Taaffe* v. *Conmee* (1), Lord Westbury says: "I arrive at the conclusion that the words 'for default of such issue male,' in conformity with their own natural meaning, and also in conformity with the rule that must now be considered to be at length finally arrived at, must mean plainly 'for default of all such issue male' as would take under the antecedent limitation."

In the same case Lord Cranworth says: "I take it that the doctrine is now well established, that whether cross-remainders are to be implied or not is a mere question of construction upon the whole face of the will, and wherever there are limitations in tail, or in tail male, and in default of such issue a gift over, then I take it that the presumption is that that means in default of the issue of all of them."

Such being the presumption applicable to such a limitation, we not only find nothing in the present will by which such a

(1) 10 H. L. C., 81.

presumption can be rebutted or controlled, but we see in the express declaration of the testator that his intention is that the lands in question "shall go and remain in his name and family for ever, or as long as the law will permit," the strongest confirmation of the presumption of law; it being plain that if the absolute property in any part of the land passed to the plaintiffs as heirs, the intention thus declared would be liable to be defeated either by their marrying, or by their alienating the land, or disposing of it by will to some one not of the testator's name and family.

We are, therefore, of opinion that the contention of the defendants is right, and that our judgment must be in their favor.

Judgment for the defendants.

Attorney for plaintiffs: *Philbrick.*
Attorneys for defendants: *Church, Sons, & Clarke.*

Nov. 22, 1871.

120] FELL v. WHITTAKER.

Law Reports, 7 Queen's Bench, 120.

Landlord and Tenant — Excessive Distress, Right of Action for — Special Property in Goods distrained.

The plaintiff was tenant and the defendant landlord of a house occupied by the former, his wife, and a trustee. Goods therein had been assigned to the trustee on trust for the plaintiff's wife. Rent being in arrear to the amount of 9*l.* only, the defendant, by his bailiff, distrained for 18*l.* and costs, seizing 100*l.* worth of the goods. The rent actually due was tendered to the bailiff, with expenses, but refused, and he remained in possession until an undertaking was given on behalf of the plaintiff for payment of the whole demand, and a part amounting to 2*l.* 7*s.* was paid, whereupon the distress was withdrawn.

The plaintiff having brought an action for an excessive distress, and on the money counts, was nonsuited when the deed of assignment was produced at the trial:—

Held, that, although he was neither the legal nor the equitable owner of the goods distrained, yet he had, from his mere enjoyment of the use of them, a special property which entitled him to maintain the action.

DECLARATION that the plaintiff was tenant to the defendant of a messuage at a certain rent payable by the plaintiff to the

defendant, and the defendant wrongfully distrained for certain arrears of the said rent the goods of the plaintiff of much greater value than the amount of the said arrears, and of the charges of the said distress, and of the appraisement and sale thereof, although part of the said goods was of sufficient value to have satisfied the said arrears and charges, and might then have been distrained by the defendant for the same, and the defendant thereby made an excessive and unreasonable distress for the said arrears, contrary to the statute, &c.

Money counts.

Pleas: 1. To the first count, not guilty, by statute 11 Geo. 2, 19, s. 21. 2. To the money counts, never indebted. Issue thereon.

This action was brought in the Salford Hundred Court of Record at Manchester. On the trial the plaintiff gave the following evidence:—"I pay rent to John Henry Whittaker." [He produced receipts for certain amounts.] "I was out of town. Upon my return I found a distress in my house. The man in possession had this warrant." [Put in evidence.] "Distress for 18*l.* *and costs. A quantity of goods had [121 been seized. The value of the goods 100*l.* about. I sent for Mr. Evans" [plaintiff's attorney], "and he made an arrangement with the bailiff; Mr. Evans offered for me to pay a sum of money, viz., 9*l.*, the rent due and expenses. The bailiff refused to take it. Mr. Evans undertook to bring the money, if necessary, on the following day. Mr. Evans gave a personal undertaking to pay the amount. 2*l.* 7*s.* was paid as part of the money. Great annoyance to us." [Cross-examined.] "I have been distrained upon before by request. There was an execution out against me at this time. I have been bankrupt. This is my deed." [Put in evidence.] "An assignment of all property in the house. One of my trustees lives in the house."

The learned judge then nonsuited the plaintiff, reserving leave to move for a new trial.

A rule was obtained to set aside the nonsuit, and for a new trial, on the ground that there was evidence to go to the jury that the property in the first count of the declaration was the property of the plaintiff; secondly, that the plaintiff was entitled to recover on the other count of the declaration.

Herschell showed cause (1). The first count of the declaration alleges an excessive distress "of the goods of the plaintiff." But he was neither the legal nor equitable owner (2), nor was he even a bailee of the goods. This action could only be maintained by the owner of the goods. If the plaintiff had any special interest in them that was affected, he should have stated what his interest was. Distraining for more rent than is due gives no right of action: *Tancred* v. *Leyland* (3).

[LUSH, J. There the goods were sold; here they were kept until money was paid.]

In *French* v. *Phillips* (4) a count alleged a tenancy, and that the defendant wrongfully seized and sold goods of the plaintiff to the value of 30*l.*, as distress for 13*l.* claimed as arrears of rent, whereas, in fact, 9*l.* only was due. The plaintiff obtained
122] a verdict, *but the Court of Exchequer Chamber held that the count disclosed no cause of action.

[LUSH, J. It did not appear that the goods, when sold, realized more than the true amount in arrear; so there was no wrong.]

In *Glynn* v. *Thomas* (5) there was a seizure, but no sale, the defendant having remained in possession until his excessive claim was satisfied, and it was held in the Exchequer Chamber that a count alleging a wrongful distress whereby the plaintiff was compelled to pay a larger sum than was due for rent, disclosed no cause of action, because, as the distress was lawful, the defendant was entitled to tender of the amount really due, and upon his refusal to accept that sum the plaintiff's course was to replevy the goods. The present plaintiff suffered no legal damage from the seizure of the goods. He would enjoy the use of the furniture as well as before. Nor was he injured by the fact of more goods being distrained than were needed to satisfy the demand, for they were the goods of others. The trustees might have paid the rent, and have afterwards recovered the amount from the plaintiff.

[HANNEN, J. *Exall* v. *Partridge* (6) is an authority for saying that he was under a legal obligation to pay his rent, and that if

(1) In the Bail Court before Lush and Hannen, JJ.

(2) It was admitted and taken as a fact that the trusts of the assignment were for the plaintiff's wife.

(3) 16 Q. B. 669; 20 L. J. (Q. B.), 316.

(4) 1 H. & N. 564; 26 L. J. (Ex.), 82.

(5) 11 Ex., 870 25 L. J. Ex., 125.

(6) 8 T. R., 308.

he failed so to do, he would be liable to strangers whose goods were distrained.]

Had the goods been removed the plaintiff might perhaps have been entitled to sue in respect of his enjoyment of them, which in this instance was not interfered with. And the plaintiff cannot recover on the money counts; *Gulliver* v. *Cosens* (1).

[LUSH, J. That was a case of distress damage feasant.]

The same principle applies. Replevin was his proper remedy, and therefore an action for money had and received will not lie; *London* v. *Hooper* (2). The payment made by the plaintiff could not be set off in an action against him for another demand; *Knibbs* v. *Hall* (3).

Heywood, in support of the rule. Any kind of possession would enable the plaintiff to sue: *Bourne* v. *Fosbrooke* (4). He had the *beneficial enjoyment of the goods. The trustee [123 did not live in the house to hold possession of them. There is no distinction in principle between seizure followed by sale, and seizure only. The detention of the goods by the bailiff, although but for a short time, injured the plaintiff. In *Loring* v. *Warburton* (5), a landlord claiming more rent than was in arrear, had distrained goods of greater value than his claim, and, notwithstanding that tender was made of the amount really due, detained them until the plaintiff paid the sum demanded; on demurrer to a declaration for excessive distress, it was argued that replevin was the proper remedy, and *Glynn* v. *Thomas* (6) was cited as an authority to show that the action would not lie; but Crompton, J., said: "I never could see why an action would not lie. I should be sorry to carry the doctrine of *Glynn* v. *Thomas* (6) any further;" and Lord Campbell, C. J.: "Here is damnum cum injuria." Judgment was given for the plaintiff.

[LUSH, J. The counts in *Loring* v. *Warburton* (5) resemble those in the present case.]

And any distinction which may be found is disposed of by *Johnson* v. *Upham* (7): see per Wightman, J., delivering the judgment of the Court.

[He was then stopped.]

(1) 1 C. B., 788.
(2) 1 Cowp., 414.
(3) 1 Esp., 84.
(4) 18 C. B. (N. S.), 515; 34 L. J. (C. P.), 164.
(5) E. B. & E., 507; 28 L. J. (Q. B.), 31.
(6) 11 Ex., 870; 25 L. J. (Ex.), 125.
(7) 2 E. & E., 250; 28 L. J. (Q. B.), 252.

LUSH, J. I am of opinion that this rule must be made absolute to set aside the non-suit, and for a new trial. It is material to observe the pleadings in this case, and also to see what was the evidence given before the Court below. [His Lordship read the first count of the declaration, which he pronounced to be perfectly good, and then proceeded to read the evidence set out above.]

The effect of the evidence was, that the property in the house had been assigned to trustees, whether for the wife or for the plaintiff does not appear, but we may assume that it was for the wife. The plaintiff lived with his wife, and had the enjoyment of the property. One of the trustees also lived in the house with them. He, the plaintiff, being tenant of the house, and his rent being somewhat in arrear, a distress was put in for a 124] larger amount than *was due, a much greater quantity of goods was seized than was sufficient to satisfy even the sum claimed, and the bailiff refused to accept the amount actually due. The contention on behalf of the defendant is, that there was no evidence to go to the jury on the count for excessive distress.

Now, the argument was founded on the point taken at the trial, and to which the learned judge gave effect, viz., that inasmuch as the plaintiff was not the owner of the goods, but merely had the enjoyment of the property with the consent of his wife and the trustee, he was not in a position to maintain an action for the excessive distress, even although, to regain possession of the goods, he had to pay, or cause to be paid for him, a larger amount than that of the rent due. I think that objection is not tenable, and that he had quite enough special property to enable him to sue. The right of possession which he had with the consent of his wife and her trustee was sufficient; by virtue of that right he would have been entitled to recover possession of the goods if they had been taken away by a stranger, and by that right he is entitled to maintain the present action. I should find no difficulty in directing the jury as to the measure of damages which, I think, would be the sum he was obliged to pay in excess of the rent plus any damage arising from the inconvenience of being deprived of the possession and enjoyment of the goods.

Having regard to the cases cited, I do not think that any authority has been referred to which requires us to decide otherwise than we do now. The case which at first sight appears to lean most in the opposite direction is that of *Glynn* v. *Thomas* (1). But I see from the report that the count in the declaration there did not allege an excessive distress. That is pointed out in the judgment as one of the grounds relied on in the argument. The material count in that case commenced by alleging a wrongful distraint of the plaintiff's goods "as a distress for alleged arrears of rent, to wit, the sum of 6*l.* 3*s.*, by the defendant, then pretended to be due and in arrear to him from the plaintiff for the . . . tenements and premises, and the defendant wrongfully remained in possession of the said goods under color of the said distress, until the plaintiff afterwards . . . was compelled to pay, and did then pay, to the *defendant the said [125 pretended arrears of rent," &c., did not allege that the quantity of goods taken was excessive, nor are there any words there which would make it a good count for excessive distress under the statute; moreover, Coldridge, J., delivering the judgment of the Exchequer Chamber, says: "This is not a case of excessive distress" (2). Compare that with the facts of the present case. Here was an unlawful act alleged and proved, viz., the seizing of a larger quantity of goods than were sufficient to satisfy the amount claimed. Then, under pressure of that act, the plaintiff, in order to recover his goods, paid, or did what was equivalent to paying, the sum demanded. That circumstance distinguishes the two cases, and makes up the cause of action which I think the present plaintiff had.

HANNEN, J. I am of the same opinion. On the face of the declaration this is an ordinary action for excessive distress; and it is clear that the only question raised at the trial was, whether the averment that the goods were the plaintiff's was established, the argument being that he had assigned those goods to a trustee for his wife, and that his enjoyment of them in right of his wife was not enough to give him a right of action. I think that objection was not sustained. I think he was sufficiently interested and had sufficient enjoyment in the goods to give him a right of action against a wrong-doer, and therefore,

(1) 11 Ex., 870; 25 L. J. (Ex)., 125. (2) 11 Ex., at p. 877.

in respect of that enjoyment he may maintain this action on the assumption that there *has* been an excessive distress. With respect to the point my Brother Lush has so fully gone into, that seems exactly governed by *Loring* v. *Warburton* (1), and *Johnson* v. *Upham* (2).

Attorney for plaintiff: *Williams, for N. Evans, Manchester.*
Attorneys for defendants: *Griffiths & Brownlow, for Brown, Manchester.*

Nov. 15, 1871.

126] FLEET and another v. MURTON and another

Law Reports, 7 Queen's Bench, 126.

Evidence, Admissibility of — Usage of Trade to control written Contract — Custom in London Fruit Trade — Making Broker personally liable — Principal and Agent — Broker.

The defendants, M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs: — "We have this day sold for your account to our principal" so many tons of raisins. (Signed) "M. & W., brokers." The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action on the contract against the defendants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London colonial market: —

Held, that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract, on the authority of *Humfrey* v. *Dale* (7 E. & B. 266; E. B. & E. 1004); and that the evidence of a similar custom in the colonial market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade.

DECLARATION that on the 30th of October, 1869, plaintiffs and defendants agreed that plaintiffs should sell to defendants, and defendants should buy of plaintiffs, fifty to seventy tons of raisins at a certain price; that defendants, having accepted part, refused to accept the residue of the raisins, according to the contract.

(1) E. B. & E., 507; 28 L. J. (Q. B.), 31. (2) 2 E. & E. 250; 28 L. J. (Q. B.), 252.

Pleas, inter alia, that defendants did not agree as alleged.

Issue joined.

At the trial before Blackburn, J., at the sittings in London after Michaelmas Term, 1870, it appeared that the plaintiffs, Messrs. Fleet & Dobbing, are merchants in London, and the defendants, Messrs. Murton & Webb, are brokers in the fruit trade in London. The defendants were employed, in October, 1869, by the plaintiffs to sell for them certain consignments of raisins, and the defendants handed to the plaintiffs, the following contract note: —

"Messrs. Fleet & Dobbing. London, 30th of October, 1869.

"We have this day sold for your account to our principal, to arrive per steamer from Trieste, fifty to seventy tons of good sound *Chesne raisins, in cases, at 41*s.* per cwt., usual [127 market terms. Cash on delivery. F. & D., to draw on M. & W., for 500*l.* (if required) on landing, handing equal value. Customary allowances.

"Murton & Webb, Brokers, 25, Mincing Lane."

The defendants had purchased on behalf of Demetrius Pappa, and part of the raisins were accepted and paid for by him through the defendants; but, becoming embarrassed, he refused to receive any of the other consignments, upon which, on the 1st of December, 1869, the defendants wrote to the plaintiffs, informing them that Mr. Demetrius Pappa was the buyer under the contract of the 30th of October, 1869, and that he refused to receive any more of the raisins; to which the plaintiffs replied, that the buyer was bound to receive the whole, and that they knew nothing of Pappa, whose name the defendants now furnished, as the plaintiff's contract was with the defendants themselves.

In order to make the defendants personally liable on the contract, evidence was tendered on behalf of the plaintiffs that, in the London fruit trade, if the brokers do not name their principal in the contract-note itself, the brokers are held personally responsible on the contract. And evidence was also tendered of a similar custom in the London colonial market: viz., that the brokers are held personally responsible, unless they give the name of their principals in writings, within three days after making the contract. Both classes of evidence were re-

ceived by the learned judge, after objection by the defendants' counsel; and the jury found that the custom was proved.

A verdict passed for the plaintiffs (the amount to be afterwards settled), with leave to move to enter a verdict for the defendants, or a nonsuit, if the Court should be of opinion that evidence of custom was not admissible.

A rule was obtained accordingly to enter a verdict for the defendants or a nonsuit, on the ground that the evidence of custom was not admissible to add to, alter, or vary the contract; or for a new trial, on the ground that evidence of the custom in the colonial market was not admissible.

H. James, *Q. C.*, and *Cohen*, showed cause. The first point, as to the admissibility of evidence of a custom in the particular trade 128] *whereby the broker is held personally liable on the contract unless he disclose his principal's name, is concluded by the authority of *Humphrey* v. *Dale* (1). This custom is clearly not inconsistent with the written contract within that case. Nor is it any answer to say, that to hold the defendants liable would be to make two principals in the contract; that double liability occurs whenever a broker contracts for an undisclosed principal: *Higgins* v. *Senior* (2); *Calder* v. *Dobell* (3). But the true answer to any difficulty as to the written contract is this: The contract between the plaintiffs and defendants is the contract of employment, not the contract of sale, and the custom is attached to the employment.

[BLACKBURN, J. That is how it has always struck me; but then the declaration should have been on that contract as evidenced by the custom, in a count similar to a count on a del credere commission.]

The court has full power to amend. Secondly, the evidence as to the custom in the colonial trade was admissible as evidence in an analogous trade in the same place. In *Noble* v. *Kennoway* (4), the contract relating to Labrador, evidence was admitted of the custom in Newfoundland as to similar voyages in the fishing trade. *Falkner* v. *Earle* (5) is a similar decision as to different or new ports in the same country.

(1) 7 E. & B., 266; 26 L. J. (Q. B.), 137; S. C. in Ex. Ch. E. B. & E., 1004; 27 L. J. (Q. B.), 390.
(2) 8 M. & W., 834.
(3) Law Rep., 6 C. P., 486.
(4) 2 Dougl., 510.
(5) 3 B. & S., 360; 32 L. J. (Q. B.), 124.

Murphy, in support of the rule. The custom here contradicts the contract, for the name must be given on the face of the contract: otherwise the broker is to be taken as principal; which distinguishes the case from *Humfrey* v. *Dale* (1). *Fairlie* v. *Fenton* (2) is directly in point for the defendants. Secondly, no foundation was shown for the admission of the evidence of the custom in the colonial trade; there was no evidence that the two trades were in any way analogous. In *Noble* v. *Kennoway* (3) the trades of Labrador and Newfoundland were identical, both being the fishing trade. To hold that this evidence was admissible will be to go further than any case has yet gone.

*COCKBURN, C. J. I am of opinion that this rule must [129 be discharged. I quite agree in the propriety and soundness of the decision given by the Court of Exchequer in the recent case of *Fairlie* v. *Fenton* (2), where the plaintiff contracted, as a broker, for a principal named, for in that case the principal was named; and I am of opinion that the same principle would apply where the principal is not named, so long as it appears on the face of the contract that the broker is contracting, as broker, for a principal, and not for himself as principal; and in that case, also, the broker would not be liable on the contract if the principal failed to fulfil his contract. But I think, nevertheless, that the evidence of the custom was admissible, and that, after that evidence had been given, the brokers were properly held liable on the contract. For, although where a party contracts as agent there would not, independently of some further bargain, be any liability on him as principal, yet, if a man, though professing on the face of the contract to contract as agent for another, and to bind his principal only and not himself, chooses to qualify that contract by saying that he will make himself liable, though he is contracting for another, and giving to another rights under the contract, he himself will incur the same liability as his principal. Now, although, where a party professes to contract as broker, it might prima facie be taken that he contracts without the intention of incurring liability on his own part, yet, if by the custom of the particular trade there is that qualification of the contract (which, if written into the contract in extenso, would undoubtedly bind him), that qualification may, I think, be imported into the contract by evidence of the custom. In

(1) E. B. & E. 1004; 27 L. J. (Q. B.), 390. (2) Law Rep., 5 Ex., 169. (3) 2 Dougl., 510.

the case of *Fairlie* v. *Fenton* (1) there was no qualifying circumstance like the custom in the present case. The defendants here undoubtedly call themselves "brokers," acting for their principal. But if the custom attaches, the non-liability, which would under ordinary circumstances prima facie exist in a contract made by a person purporting to contract as broker, ceases, and the contract assumes a different form and character, and carries with it different legal consequences, by reason of the custom of the trade, evidence of which, according to all principles, is admissible to qualify the terms of a contract where not inconsistent with it.

130] *I am of opinion, therefore, that the evidence of custom in the particular trade, was properly received by my Brother Blackburn to fix the liability of the defendants.

I own I entertain somewhat more doubt as to the admissibility of evidence of a similar custom in other trades than the particular trade which was the subject-matter of this contract. This case seems to me to go further than the case of *Noble* v. *Kennoway* (2), which related to the admissibility of evidence of custom in the trade of Newfoundland as applicable to the custom of the trade in Labrador. Labrador had been recently annexed to Newfoundland (3), and the trade in each was of the same description, it being a trade that related to fishing. By the terms of the contract (a policy of insurance) the ship was to be at liberty to call at Newfoundland, and it might be fairly inferred by persons entering into a contract with reference to the trade of Labrador, that what was the custom of the trade of Newfoundland would extent to the trade of Labrador. But this case goes further. At the same time it is impossible to shut one's eyes to the fact that the moral effect of the evidence would operate on a reasonable mind with very considerable force. If there exists a custom to the effect that the agent makes him-

(1) Law Rep., 5 Ex., 169.

(2) 2 Dougl., 510.

(3) The disputed territories of Newfoundland and Labrador were ceded by the French to the English by the treaty of Utrecht in 1713, and this cession was finally affirmed by the treaty of Paris in 1763; and in October of that year Labrador was annexed to the government of Newfoundland by royal proclamation. In 1774, by 14 Geo. 3, c. 83, Labrador was made part of the then province of Quebec, and afterwards in 1791, on the division of that province into Upper and Lower Canada, it became part of the lower province. Finally, in 1809, by 49 Geo. 3, c. 27, s. 14, Labrador was re-annexed to Newfoundland.

self liable under given circumstances, in a large and extensive trade like the colonial trade, it makes it more probable that in the fruit trade in the Mediterranean or elsewhere a similar custom would obtain. I am not quite so clear on the point, but still I do not think that the argument addressed to us goes so far as to show that this evidence was not admissible. There is no doubt that it would be useful in elucidating the truth: and, therefore, on general principles, I think the evidence was admissible, and I concur with the judgment which my learned Brothers are about to pronounce.

*Blackburn, J. I am of the same opinion. Upon the [131 first point I quite agree with what my Lord has said. The recent decision of the Court of Exchequer in *Fairlie* v. *Fenton* (1) was perfectly right. I take it that there is no doubt at all, in principle, that a broker, as such, merely dealing as broker, and not as purchaser of the article, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller, and that consequently where the contract, as in the present case, in terms says, "Sold to A. B.," or "Sold to my principals," and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods; he is simply the broker making the contract. Then I take it that there is no doubt at all, that the rule of law laid down in the case of *Higgins* v. *Senior* (2), and the other cases there cited, such as *Jones* v. *Littledale* (3), is perfectly correct, namely, that where the agent of the purchaser, though really making the contract between two principals, chooses to make the contract in writing in a form in which he declares himself to be the contracting party, he thereby says, "I am to be liable." And though he has done this, yet, his principal also is liable; because the agent who has made the contract does bind his principal, though he has chosen to bind himself also; and it is no answer (as was held in the recent case in the Common Pleas of *Calder* v. *Dobell* (4), which was affirmed in the Exchequer Chamber) to say on the part of the principal, "the contract was made by my agent, and my agent is responsible." That the agent is liable is no answer, and no reason why the principal should not be responsible. Consequently, I

(1) Law Rep., 5 Ex., 169.
(2) 8 M. & W., 834.
(3) 6 A. & E., 486.
(4) Law Rep., 6 C. P., 486.

agree that in the present case, if it were not for the evidence of custom, the defendants who contract for a principal "sold to our principal," and sign as brokers, would not have been liable at all upon this contract. But then there came the custom, and the evidence of custom was to this effect: that in this trade the brokers deal on these terms. The custom is that if the broker does not disclose his principal's name on the contract he is personally liable. The custom did not go to the extent, and there is not the slightest ground for saying that the custom went to
132] show, that the principal was not liable *also, or that the principal was discharged. It was simply this, that if the broker did not name the principal in his contract he incurred personal liability.

Now upon the point of whether the evidence was admissible, several questions arise upon these pleadings. If the matter were res integra, I should have felt great difficulty indeed, as some of the Judges in the Exchequer Chamber did in *Humfrey* v. *Dale* (1), in making out how the custom could make the broker, who is, in fact, not contracting as purchaser, liable in the terms of the count in that case which charged the defendant as purchaser. But *Humfrey* v. *Dale* (1) is binding upon us as to this point. My own impression is, that the right way to declare, if this case should ever go to the House of Lords, would be by a count analogous to a count on a del credere commission. Parke, B., in *Couturier* v. *Hastie* (2), in an elaborate judgment, gives the effect of such a contract. The contract-note was like the present. It was in the corn trade. There was a contract-note in which the defendants, as brokers, sold to their principal, and delivered a contract-note to the other party. The evidence of custom was that in all such cases the broker receives a del credere commission, and has the liability of a del credere agent. The objection taken to the liability of the defendants was, that there was no note in writing, and that selling on a del credere commission was a guaranteeing within the Statute of Frauds. But, says Lord Wensleydale, in delivering a considered judgment, it was nothing of the sort, "the defendants being the agents to negotiate the sale, the commission is paid in respect of that employment. A higher reward is paid in consideration

(1) E. B. & E., 1004; 27 L. J. (Q. B.), 390.

(2) 8 Ex., 40, 56; 22 L. J. (Ex.), 97, 103.

of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by the vendees. This is the main object of the reward being given to them; and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given:" He says that it is neither a guaranteeing nor a contract of sale, and that *consequently the Statute of Frauds is out of the [133 question. It seems to me, therefore, as Mr. Cohen said, that this custom must be taken as merely regulating the terms of the employment. I cannot see that it differs from the case of a board stuck up at a broker's office, saying: "Nota bene; we are brokers engaged in the fruit trade, and we conduct business, when employed, on the following terms: If we receive an extra commission of one per cent, we have all the liability of del credere agents; but, if we do not, we are not liable to tell you the names of our customer in the bought note; but we tell you,—as it is a matter of considerable importance to us, that we should not let you know who our principals are,—that, if we conceal the names of our principals, and you choose to deal with us on these terms, we will take all the liability of del credere agents, though we don't receive the commission." Certainly, if such a notice were stuck up over the doors of the fruit brokers, and then people came in and dealt with them on those terms, I cannot see that to charge them that they dealt, as brokers, upon the terms which they published, would be in the slightest degree inconsistent with, or contradictory to, or qualifying, or in any way interfering with, the contract expressed when they delivered the contract-note. But inasmuch as the Exchequer Chamber, on precisely similar counts, in *Humfrey* v. *Dale* (1), thought the evidence was admissible, on the declaration as it stands in this case, it would be unwise to amend now; but if the case ever goes to the House of Lords it may be worth while to consider, whether a count setting out such a contract will not obviate all objection.

Now, passing from that point, we have to consider whether the evidence of custom in the colonial trade was admissible;

(1) E. B. & E., 1004; 27 L. J. (Q. B.), 390.

and I am bound to say that I clearly think it was. The objection taken was that there was no evidence to make the defendants, the brokers, responsible at all. Then the plaintiffs' counsel said, "I will prove by evidence of persons connected with the fruit trade, that the broker, where he does not disclose the principal's name, makes himself personally liable." The plaintiffs accordingly offered evidence to prove such a custom, and, to strengthen the evidence, showed that in the colonial trade brokers did 134] incur a personal *liability if they did not disclose their principal's name. What was proved was this: that the trades were very closely allied to each other. All brokers are very closely connected with each other; they all deal with merchants, and with much the same merchants, in the general way of business; and they buy and sell sometimes fruit, sometimes wool, and sometimes other things. And it struck me, where the question was, does a broker, in the fruit trade, if he does not disclose his principal's name, incur a personal liability in consequence, that it would be proper evidence for a jury to consider and weigh, that such a custom existed in other trades, and that in those other trades the broker did incur a personal liability. I think it cannot be denied that any sensible person would say, that the existence of such a liability in the colonial trade, as was established in *Humfrey* v. *Dale* (1), would be very cogent evidence as to whether there would be such a liability in the fruit trade. That is the reason, because I thought it would have this strong bearing on the case, that I left it to the jury. I quite agree that the case of *Noble* v. *Kennoway* (2) bears but slightly upon the point. It is, to some slight degree, analogous; but very slightly indeed, and there is no other authority cited at all; therefore we must go on the principle of common sense. This point was not reserved; but if the defendants go to error on the other main point, they ought to have leave to take this point also.

Mellor, J. I am of the same opinion. I do not propose to add anything as to the first two points, because I think they have been conclusively disposed of by my Lord and my Brother Blackburn. But with reference to the last point as to the admissibility of the evidence of the custom in the colonial trade,

(1) E. B. & E., 1004; 27 L. J. (Q. B.), 390. (2) 2 Dougl., 510.

which is a new point so far as I am aware, I think this case goes further than any case has actually gone; yet I cannot help thinking that the evidence was relevant to this case and admissible, on the ground that, showing, as it did, what was the custom in other trades, though not so analogous, no doubt, to the trade in question, as was the trade in *Noble* v. *Kennoway* (1), it tended to show the probability, that in the fruit trade as well as in the colonial trade the broker *did under given circum- [135
stances undertake a similar responsibility.

Rule discharged.

Attorneys for plaintiffs: *Lowther, Mullens, & Clair.*
Attorneys for defendants: *Stibbard & Beck.*

(1) 2 Dougl., 510,

Usage or custom may be shown to explain an ambiguous term or to explain a contract which is not definite in its terms. *Cuthbert* v. *Cumming,* 10 Excheq., 809, affirmed Exch. Cham.; 11 Excheq. Rep., 405; *Muncey* v. *Dennis,* 1 Hurl. and Norm., 216; *Van Santvoord* v. *St. John,* 6 Hill, 157; *Smith* v. *Dann,* 6 Hill, 543.

So whether one is understood to contract as a principal or agent. *Cropper* v. *Cook,* L. R. 3 C. P., 194.

One who employs a broker is presumed to deal with reference to the custom of brokers whether known to him or not. *Whitehouse* v. *Moore,* 13 Abb. Prac. Rep., 142; *Horton* v. *Morgan,* 19 N. Y., 170.

In a complaint by a broker against his principal, it is therefore unnecessary to allege that the latter knew of the existence of a custom on which the action is founded. *Whitehouse* v. *Moore,* 13 Abb. Prac. Rep., 142.

It is not competent to show that words used in a written contract which have received a judicial interpretation have acquired by the usage of trade a commercial meaning variant from, or in conflict with that which the courts have adjudged to be their true meaning. *Budgett* v. *The Orient Mutual Ins. Co.,* 3 Bosw., 385. *Hulburt* v. *Carver,* 37 Barb., 62 S. C. 40 Barb., 245; see note to *Phillips* v. *Briard,* 1 Hurl. and Norm. 30, Johnson's Am. ed.; *Westcott* v. *Thomson,* 18 N. Y., 367; *Home* v. *Mutual,* &c., 1 Sandf. S. C. R., 137, affd. 2 N. Y., 235; *Emery* v. *Dunbar,* 1 Daly, 411; *Simmons* v. *Lalo,* 8 Bosw., 214; *Trustees,* &c., v. *Brooklyn,* &c., 23 How., 448; see also 2 Albany Law Jour., 366, and article 2 Am. Law Reg. N. S., 139.

The usage must be general. *Ehle* v. *Chittenango Bank,* 24 N. Y., 548; *Scott* v. *Central R. R.,* 52 Barb., 45.

But though usage may be proved it is not competent for a witness familiar with the usage to testify as to what construction the contract bears; *Collyer* v. *Collins,* 17 Abb., 468.

As to what is an usage see *Sleght* v. *Hartshorne,* 2 Johns, 541. As to how much evidence is necessary to show an usage, see *Weber* v. *Kingsland,* 8 Bosw., 415; *Wood* v. *Poughkeepsie,* &c., 32 N. Y., 619.

Evidence of usage by one class of men is not admissible to bind another. *Field* v. *Burham,* 9 Bosw., 468; *Sleght* v. *Hartshorne,* 2 Johns., 541.

139] *[IN THE EXCHEQUER CHAMBER.]

Nov. 27, 1871.

SMITH v. MYERS and another.

Law Reports, 7 Queen's Bench, 139.

Contract of Sale of Cargo "expected to arrive" by a particular Ship.

The defendants' correspondents at Valparaiso bought on their account of S. & Co. 600 tons of nitrate of soda, and on the 16th of July, 1868, they chartered the bark *Precursor* to bring it to England, and they, on the same day, wrote to the defendants of this. On the receipt of the advice, the defendants, on the 8th of September, made a contract, through brokers, with the plaintiff: "We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s*. 9*d*. per cwt. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the mean time, on the 13th of August, an earthquake had destroyed the greater part of the nitrate of soda while lying at the port of lading; and, it having been determined by arbitration, pursuant to the contract, that S. & Co. were not bound to supply other soda, on the 2d of September the Valparaiso house had cancelled the charter of the *Precursor*. Afterwards, on learning from the defendants that they had sold the nitrate of soda to arrive, but not on what terms, they purchased other 600 tons of nitrate of soda at above the defendants' limit, and obtained a transfer of a charter of the same bark *Precursor*, and shipped the nitrate about the 23d of December to the defendants, to enable them to execute their contract, if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on the 8th of May, 1869, and the plaintiff demanded the cargo under the contract of the 8th of September:—

Held, affirming the judgment of the Court of Queen's Bench, that the plaintiff was not entitled to the cargo.

APPEAL from the decision of the Court of Queen's Bench, making absolute a rule to enter a verdict for the defendants.

This was an action for not delivering a cargo of 600 tons of nitrate of soda pursuant to a contract of sale of the 8th of September, 1868.

The facts of the case are fully set out in the report in the court below (1), and sufficiently appear from the headnote.

A verdict passed for the plaintiff at the trial, with leave to move to enter a verdict for the defendants; and the Court of Queen's Bench made the rule absolute, on the ground that the contract, though not for a specific cargo, was a contract for a specific adventure, which was put an end to by the destruction of the soda by the earthquake.

(1) Law Rep. 5 Q. B., 429.

*R. G. *Williams* (*Quain*, Q. C., with him), for the plaintiff, urged the same arguments as in the court below. He cited *Johnson* v. *Macdonald* (1). [140

Milward, Q. C. (*Baylis* with him), for the defendants, was not heard.

KELLY, C. B. The question in this case is, whether the contract before us of the 8th of September, 1868, relates to a specific quantity of nitrate of soda which was purchased, and which is, in fact, referred to in the letter of the 16th of July, or whether it relates to a certain quantity of nitrate which might at a subsequent time have been purchased, and which might ultimately have been conveyed to England in the *Precursor*. I am clearly of opinion that it relates to the quantity which is referred to in the letter of the 16th of July, the quantity which had been actually purchased, and which was intended to be conveyed, and therefore was, within the very terms of this contract of the 8th of September, by the defendants "expected to arrive" by the *Precursor*. There can be no doubt, when we look at the facts of the case, that a specific quantity of 600 tons of nitrate had been purchased by the agents of the defendants at Valparaiso, and that the letter of the 16th of July informed the defendants of that purchase, and that the ship *Precursor* had been chartered in order to convey that specific quantity so purchased to this country; that when the contract was entered into by the defendants with the plaintiff they undoubtedly meant nothing else than the specific quantity referred to in the letter of the 16th of July, and which they believed was at that time either actually shipped on board the *Precursor*, or was then lying ready to be shipped on board. The question is, whether the mere accident that that letter was not communicated by the defendants to the plaintiff alters the meaning and the legal effect of the contract which was entered into, and converts the specific quantity, which no doubt the defendants intended, and which is actually the property described by the contract, into any quantity which may or may not have been at the time purchased, and which should afterwards have been sent to this country by the *Precursor*. I think it does not. We have only to look at the terms of the contract *itself to see it clearly refers [141

(1) 9 M. & W., 600.

to some specific quantity to which the description in the contract directly applies. The words of the contract are: — "We have this day sold to you, on account of Messrs. W. J. Myers, about 600 tons of nitrate of soda." Now if it had stopped there, it might have meant any 600 tons which might at that time have been, or which might thereafter be purchased. But they go on to give this precise description to the 600 tons the subject of the contract. "About 600 tons, being the entire parcel of nitrate of soda expected to arrive at the port of call per *Precursor*." Now, does not this as plainly as words can speak say to the plaintiff, "There is a certain quantity about 600 tons, of nitrate of soda, expected to arrive at the port of call, and it is one entire parcel?" I think that without any communication of the letter of the 16th of July to the plaintiff, the plaintiff was apprised by the terms of this contract that it related to some one entire parcel of nitrate of soda, which the defendants expected to arrive by the *Precursor*. There was, therefore, an entire quantity, and a specific quantity which the defendants expected to arrive, and that quantity, it is clear, was described in the contract; and the words in the subsequent condition seem really to place the case beyond all doubt: "Should any circumstance or accident prevent the shipment of the nitrate, this contract to be void." Has not this provision in the contract attached? It is very true that an accident had occurred before the date of this contract, although it was unknown to the parties, but whether it was an accident which had already occurred, or which might occur, it was an accident. I say nothing at this moment of the award. There was an accident from an earthquake having destroyed the greater quantity of the nitrate, which de facto prevented the shipment on board the *Precursor*, and therefore, under the precise terms of this part of the contract, the condition on which the contract was to be void had attached.

Let us suppose that this nitrate of soda had not been destroyed by the earthquake, but had been conveyed to a wharf and was about to be shipped on board the *Precursor*, and an embargo had been laid upon it, which prevented the shipment, and the *Precursor* had consequently sailed without it, but the *Precursor* at the time had on board another quantity of 600 tons of other
142] nitrate of *soda consigned by this house at Valparaiso to

the defendants in Liverpool, could the plaintiff have claimed that quantity? There would have been 600 tons of nitrate of soda which had arrived by the *Precursor*, just as the soda in question did ultimately arrive by the *Precursor*, could he have claimed it, and why not? He clearly could not; that might have been contracted to be sold by the defendants to other persons, and he would have no right to it under the contract in question. Why could he not have claimed it? Because the answer of the defendants would have been this: "We undertook to sell to you a quantity of nitrate of soda expected to arrive by the *Precursor*, and we referred to a particular quantity which had been purchased, and that quantity which we thus referred to has been prevented by an accident, an embargo laid upon it, being shipped on board this vessel, therefore we cannot perform the contract, because, by virtue of the condition, the contract is void."

It appears to me, therefore, whether we look at the language of the earlier part of the contract where they specify the quantity in question by description, which is an entire parcel of nitrate of soda expected to arrive, or whether we look at the subsequent provision, that if any accident should prevent the shipment of the nitrate, the contract is to be void, the contract is intended to refer to a specific quantity which the defendants had notice of in the letter of the 16th of July. That specific quantity was prevented from being shipped in consequence of an accident, whether we take the accident to be the earthquake, or whether we look at the meaning of the award, which had the effect of preventing the shipment of any quantity of nitrate under this contract on board the *Precursor*: so that the contract under the provision which is contained in it became void, and, consequently, the plaintiff is unable to enforce it.

Upon these grounds, I think that the judgment of the Court of Queen's Bench was right, and must be affirmed.

WILLES, J. I entirely agree, in the main, with my Lord Chief Baron as to the judgment of the Court; but I must reserve my opinion as to the supposed case of 600 tons being put on board and being claimed by several people. I cannot, as at present *advised, agree with what he has said on that sup- [143
posed case of several people claiming 600 tons put on board

under separate contracts; but it is unnecessary to go that length in the present case. My notion is, that, as the seller stipulated that, if the intended shipment of the whole cargo was prevented by any circumstance or accident, the contract was to be void, the earthquake and award (though that was res inter alios acta), were a circumstance which the parties must be taken to have had in contemplation, and therefore, that that did amount to a circumstance or an accident which avoided the contract.

CHANNELL, B. I am of the same opinion. I think the judgment of the Court below must be affirmed.

KEATING, J. I am of the same opinion.

PIGOTT, B. I agree with the reasons given.

CLEASBY, B. I have nothing further to add, than that the cargo which arrived in May was not the cargo which in September was expected to arrive.

Judgment affirmed.

Attorneys for plaintiffs: *Jones, Blaxland, & Son, for Abbot & Leonard, Bristol.*

Attorneys for defendants: *Walker & Sons, for Ellis & Field, Liverpool.*

As to the construction of contracts for the sale of goods to arrive, see *Lovatt* v. *Hamilton*, 5 Mees. and Welsb., 639; *Havemeyer* v. *Cunningham*, 35 Barb., 515; *Reimers* v. *Redner*, 26 How. Prac. Rep., 385; 2 Robertson, 11; *Swift* v. *Opdyke*, 43 Barb., 274.

*[IN THE EXCHEQUER CHAMBER.] [144

Nov. 27, 1871.

COATES and another v. COLLINS.

Law Reports, 7 Queen's Bench, 144.

Covenant for Title — Assignment of Lease for Lives — Covenant that Lease is subsisting for the Three Lives.

By deed of July, 1853, after reciting a lease of the 10th of March, 1847, from E. F., to defendant, for the lives of A., B., and C., and the survivors or survivor of them, defendant conveyed the premises to plaintiffs, to hold for the lives of A., B., and C., and the survivors or survivor of them, and covenanted "that the said lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of the said A., B., and C., and the survivors or survivor of them, and is not forfeited, surrendered, or become void or voidable." B. having died before July, 1853, plaintiffs sued defendant for a breach of the covenant: —

Held, affirming the judgment of the Court of Queen's Bench, that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting, and not to an implied covenant that the three lives were still in existence.

ERROR from the judgment of the Court of Queen's Bench in favor of the defendant on demurrer to a plea.

The declaration was on an assignment of the 2d of July, 1853, by the defendant to M. G. W. Coates (whose estate had since vested in the plaintiffs) of a lease of the 10th of March, 1847, for three lives, with a covenant by the defendant that the said lease was a good, valid, and subsisting lease for the said three lives. Breach: that one of the lives had dropped before the assignment.

The plea set out the deed of assignment of the 2d of July, 1853, at length. It was an indenture between the defendant of the one part, and M. G. W. Coates of the other part, and recited (inter alia) the lease of the 10th of March, 1847, whereby Lady Emily Foley demised to R. H. Lenthal and G. C. Carden, their heirs and assigns, for the natural lives of W. Walker, W. Jones, and R. Heath, and the natural lives and life of the survivors or survivor of them, at the yearly rent of 5*l.* and 5*l.* 5*s.*, for a heriot on the decease of each of the said lives, and subject to the covenants, provisoes, and agreements therein contained; and an assignment of the lease by Lenthal (Carden having died) to the defendant; and witnessed that the defendant, in con-

sideration of 1225*l.* granted and conveyed to M. G. W. Coates, his heirs, executors, administrators, and assigns, a certain mes-
145] suage and premises, to hold "for *and during the lives of the said W. Walker, W. Jones, and R. Heath, and the lives and life of the survivors and survivor of them, subject to the rents, heriots, covenants, provisoes, and agreements in the said recited lease of the 10th of March, 1847." There was (inter alia) a covenant by the defendant "that the said recited indenture of lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law for the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors and survivor of them, and is not forfeited, surrendered, or become void or voidable;" and that the said yearly rents and all covenants, &c., had been paid and observed. There was also a covenant for quiet enjoyment "during the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors or survivor of them," and a covenant, for further assurance, "from time to time, and at all times hereafter, upon reasonable request by Coates, unto him for the lives of the said W. Walker, W. Jones, and R. Heath, and the survivors or survivor of them."

The plea concluded, and though true it is that the said W. Jones did die before the making of the deed of the 2d of July, 1853, yet the other lives were then living; and, unless the covenants were broken by the fact of Jones having so died, none of the covenants were broken as alleged.

Demurrer and joinder.

In the Court of Queen's Bench (1) Blackburn and Mellor, JJ., were of opinion that the covenant relied on in the declaration only amounted to a covenant that the lease was still subsisting, and not to a covenant that the three lives were still in existence; Lush, J., being of a contrary opinion.

J. Brown, Q. C. (*A. T. Laurence* with him), for the plaintiffs. Taking the whole deed together, it is plain that it purports to assign the whole of the original term, and not merely so much as might remain. The habendum itself amounts to this. If one life might have dropped, so might two; but it is impossible to say that the habendum would have then been in this form. It is clear, as Blackburn, J., says, that the parties thought all

(1) Law Rep. 6 Q. B., 409.

the lives were still in existence; and if so, it is equally plain that the covenant must mean what Lush, J., says it does.

*[KEATING, J. The covenant for further assurance "at [146 all times" is in the same terms as to the three lives; but how could the assignor be able to assure for the three lives after one had fallen?]

The covenant must be taken reddendo singula singulis.

[WILLES, J. Are there any precedents in the books, in conveyances of leases for lives, of a covenant that the lives are still in existence? Is it not a matter of fact for inquiry and requisition rather than for a covenant in the deed? I have been able to find only one instance, in 2 Roll. Abr., p. 249 (1), of anything like such a covenant.]

There are certainly no precedents to be found in the books. But why may not the assignee look to a covenant for security, instead of making inquiry? For that no inquiry was made is clear from the fact that the life had dropped. The judgment of Lush, J., in the court below, as well as of Lord Ellenborough, C.J., in *Barton* v. *Fitzgerald* (2), show that effect ought to be given to what the parties must have intended. The plaintiffs must be taken to have contracted to purchase a lease for three lives, and the defendant to sell that; but one of the lives, it is

(1) 2 Roll. Abr., p. 249, Parols (D), pl. 2: The placitum is thus translated in 16 Viner, p. 205, Parols (D), pl. 2: If a lease for years be made to A., determinable upon the lives of B., C., and D., and after B. dies, and then A. assigns to E., and after E. by indenture reciting the said lease, and the death of B., and the assignment to him by this indenture, now assigns the term to F., and covenants with him that he himself is lawfully possessed of all the premises, of a good and sufficient estate for the residue of the said term then to come, "If the said C. and D., or either of them, shall happen so long to live, and they, the said C. and D. are yet in full life;" though the words are not "and *that* the said C. and D. are yet in full life," yet it is implied by the words, and it ought to be a several covenant, or otherwise this last part will be void and to no effect. Trin. T. 11 Car. B. R., between *Baskett* and *Scott*, adjudged upon a demurrer, in which the breach was assigned, because C. was dead at the time of the assignment made to him, and the word "that" was added to the other words in the declaration, and the defendant demanded oyer of the indenture, which was entered in hæc verba, in which the said word "that" was not; yet, because it was no more than the law implied, it was adjudged good. Intratur P. 11 Car. 1, B. R. Rot., 221. [This appears to be the case referred to as "P., 11 Car., 1, 221," in Lord Nottingham's MS. notes of the argument in *Holles* v. *Carr* (3 Swanst. at p. 649). See also 2 Freem at p. 4.]

(2) 15 East, at p. 541.

admitted, had dropped. Would the plaintiffs have so contracted unless they had the security of the defendant's covenant?

147] **Manisty*, *Q. C.* (*Lord* with him), for the defendant. The words throughout are mere words of description. Had the plaintiffs intended to rely on a covenant of the defendant, they would have taken care that it should be express that the three lives were in being in so many words, and would not have left it to mere implication. All the defendant assured by his deed was a valid assignment of the original estate, which remains the same, and is aptly described as a subsisting lease for the three lives and the life of the survivor as long as one of the lives exists.

J. Brown, *Q. C.*, in reply.

KELLY, C. B. But for the opinion expressed by my Brother Lush,—and every opinion of that learned judge is entitled to the utmost respect,—I should have had no hesitation in saying that this was a case entirely free from doubt. The covenant in question is an express covenant that the lease is a good, valid, and subsisting lease in the law for the three lives named; and no doubt it was a good and subsisting lease, though one of the lives had dropped. That this is the meaning is plain to my mind, and the introduction of the lives is simply matter of description; and this is made still plainer by the words which follow: "and is not forfeited, surrendered, or became void or voidable." It appears not to be the practice of conveyancers in assignments of leases for lives to introduce an express covenant that the lives are still in being; and no instance has been found (beyond the single case which the learning and research of my Brother Willes have brought to our notice) of a covenant of this sort. Here the plaintiffs are driven to contend that there is an implied covenant to that effect; but this is shown to be an unusual covenant, and surely, if the parties had intended such a covenant at all, they would not have left it to mere implication, but would have, in express terms, both recited and covenanted that the lives were in being. It has been suggested that, when we look at the habendum, which is for the three lives and the survivors or survivor of them, the language amounts to an undertaking that the lives were all in existence at the time of the assignment; but it merely means that the assignee

is to hold the whole estate of the assignor, that is, for all or for such of the lives as do survive. As I have said, had the parties intended *a covenant that the lives were all still in being, [148 there would have been a recital and covenant to that express effect, as in the case referred to by my Brother Willes.

WILLES and KEATING, JJ., and CHANNELL, PIGOTT, and CLEASBY, BB., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Stocken & Jupp.*
Attorneys for defendant: *Routh & Stacey.*

Nov. 27, 1871.

*MARSHALL v. THE ULLESWATER STEAM NAVIGATION COMPANY. [166

Law Reports, 7 Queen's Bench, 166.

Trespass — Navigation of Lake, Obstruction of.

The plaintiff was the owner of the soil forming the bed of a navigable lake, and also of a pier which had been thereon erected wrongfully by a third person. The defendants, in common with the public, had the right of navigating the lake, and were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, and therefore had a right to embark and disembark, at the land leased by them, passengers using the defendants' boats on the lake. The pier was maintained by the plaintiff, and from its position prevented the defendants from getting with their boats to the land leased by them when landing and taking on board passengers: —

Held, that the defendants were justified in causing passengers to pass and repass over the pier between their boats and the land leased by them.

CASE stated by a judge's order, without pleadings.

Trespass to a pier or jetty of the plaintiff, and causing persons to go, pass, and repass over and upon the pier or jetty, and there to embark or disembark from steamboats or other boats and vessels.

1. In April, 1859, H. W. Askew, the owner of some land adjoining Ulleswater Lake, and within the manor of Glenridding, entered into the following agreement with the defendants: —

"I do hereby on behalf of myself, my heirs, and assigns grant to the Ulleswater Steam Navigation Company through my field a right of way parallel to the River Glenridding, connecting the public road with the Beckfoot and with the pier (which is about to be erected), for the term of twenty-three years, the company paying me for the same 10*l.* per annum during the years ending April, 1860 and 1861, and 20*l.* per annum for the 167] remaining twenty-one years of *the above term; the rent to be paid at the expiration of each current year from date hereof. The above-named right of way and pier are granted on the above terms to the company upon the distinct understanding that they are to be used by the company exclusively for purposes in connection with the steamers, such as conveying, landing, and shipping passengers and light luggage only, but to the entire exclusion of lead, ore, coal, lime, minerals, or other heavy goods; and if such are conveyed on the above-named road, the annual rent will be 100*l.* during the remainder of the lease from the date at which such heavy goods are so conveyed. I also undertake to construct upon the above-named right of way a good and sufficient road (to connect the public road with the pier), and also a proper and commodious pier for shipping and landing passengers and goods, to the satisfaction of the secretary to the company by the 10th of June, 1859, for the sum of 200*l.*—100*l.* of which is to be paid to me by the Ulleswater Steam Navigation Company on the 20th of May, and the remaining 100*l.* when the road and pier are completed."

2. Askew afterwards made and constructed the road and pier.

3. By a lease, dated the 18th of July, 1859, and made for the carrying out of the agreement, Askew, for the considerations therein mentioned, granted and demised to the defendants all that parcel of ground situate in the parish of Barton, in the county of Westmoreland, adjoining the Lake Ulleswater, as then marked out and intended for a pier and road then in progress of formation by the lessor, provided always, and it was by the lease expressly agreed and declared that the pier should be used by the lessees, their officers and servants exclusively, for traffic in light goods, or for the landing and departing of passengers from and to the boat of the lessees with or without passengers' luggage, and with or without the carriages of passengers and the horses or other animals used for drawing the same, and not

for any other use or purpose whatsoever. This lease is still subsisting; the road and pier therein mentioned were and are the road and pier agreed to be constructed by the agreement of April, 1859.

4. The pier or jetty was made and constructed by Askew, and paid for by the defendants, pursuant to the agreement. Part of the pier was made upon land belonging to Askew and leased to *the defendants; the remainder of it was made [168 on the bed of the lake, which was and is the soil and freehold of the plaintiff. The foundations of that portion of the pier which extends into the lake, and which is 27 ft. 6 in. long, consist of piles driven into the soil or bed of the lake. The defendants from the time of the making of the pier or jetty in the year 1859, up to the present time, have used, and still use it, for the purposes mentioned in the agreement and lease of 1859.

5. In June, 1860, the plaintiff commenced an action against the defendants for breaking and entering land of the plaintiff covered with water, being a part of Ulleswater Lake, and with steamboats of the defendants coming into, and upon, and sailing upon, and over the land covered with water, to and from a certain pier or jetty of and belonging to the plaintiff, and wrongfully causing persons to go upon the pier or jetty, and there to embark on, or disembark from the steamboats, and wrongfully causing the said persons to sail in the steamboats upon and over the land covered with water. The defendants pleaded in that action a plea of "not guilty;" and also a plea that the land, &c., was not the land of the plaintiff; and, thirdly, as to the whole declaration except so far as it related to the acts complained of in respect of and as to and concerning the pier or jetty, the defendants pleaded that there was a common and public highway for all the liege subjects of Our Lady the Queen to sail, navigate, pass, and repass upon the waters of that part of the lake in the declaration mentioned, with boats, vessels, and steamboats, at all times of the year, at their free will and pleasure, and that the acts complained of, and therein pleaded to, were an use by the defendants of the highway. The defendants, by a 4th plea, traversed that the pier or jetty was the plaintiff's. The plaintiff joined issue upon all the pleas, and also new assigned as to the 3d plea, as to which new assignment

the defendants pleaded "not guilty," upon which issue was joined.

6. The cause came on to be tried at the summer assizes of the year 1861, at Appleby, when a verdict on the issue joined upon the defendants' third plea was found in favor of the defendants, and a verdict as to all the other issues was found in favor of the plaintiff. A rule nisi was afterwards obtained by 169] the defendants *in the Court of Queen's Bench to set aside the verdict on the issues so found in favor of the plaintiff, and instead thereof, to enter the verdict thereon for the defendants, pursuant to leave reserved at the trial, which rule was, upon argument, discharged. Judgment was thereupon entered accordingly, and upon an appeal by the defendants to the Court of Exchequer Chamber, the decision of the Court of Queen's Bench, in discharging the rule, was affirmed: *Marshall* v. *Ulleswater Steam Navigation Co.* (1).

7. The land covered with water, which is referred to in the action of June, 1860, included that portion of Ulleswater Lake which adjoins the land leased by Askew to the defendants, and the pier or jetty also referred to in the same action is that portion of the pier or jetty which extends into the lake as herein mentioned. The latter portion of the pier or jetty was made and constructed without the plaintiff's consent, and against his will, and has never been removed, and still remains as originally built.

8. If that portion of the pier or jetty which so extends into the lake were removed, the defendants would be able to bring their steamboats upon that portion of the lake which lies near to the land leased to them by Askew, and so near that, by means of a temporary stage or platform extending from the steamboats to that portion of the pier or jetty which is built upon the land leased to the defendants by Askew, they could disembark, and land passengers and goods from such steamboats, on the land leased to them by Askew, and also embark passengers and goods in such steamboats from the land; but in consequence of that portion of the pier or jetty which extends into the lake having been made and constructed, and not having been removed, and remaining as it was originally built, the

(1) 3 B. & S., 732; 32 L. J. (Q. B.), 139.

defendants are prevented from disembarking and landing and embarking passengers and goods without using that portion of the pier or jetty which extends into the lake.

9. The waters of the lake, at the part where the same adjoins the land leased to the defendants, are so shallow that it would be impossible for the defendants to bring their steamboats so near their land that they could land passengers and goods from the *steamboats directly upon their land, or take passen- [170 gers or goods on board the steamboats directly from their land without either a temporary or permanent stage or jetty, or platform being placed over and across the bed of the lake between the defendant's land and the steamboats.

10. Since the judgment in the action of June, 1860, was entered and affirmed, the defendants have on many occasions brought their steamboats upon the lake near to the land so leased to them by Askew, for the purpose of disembarking, and landing, and embarking passengers, and goods from and upon such steamboats upon and from the last mentioned land, and because that portion of the pier or jetty which extends into the lake had not been removed, but remained as originally built, so that without using that portion of the pier or jetty for the purpose of landing and embarking passengers, they could not land and embark passengers and goods, they used that portion of the pier or jetty for the purpose.

11. The user by the defendants of that portion of the pier or jetty which extends into the lake, for the purposes, and in the manner hereinbefore mentioned, was without the leave or consent of the plaintiff, and against his will.

12. On the 18th of July, 1867, the present action was brought in respect of the use by the defendants, for the purposes aforesaid, of that portion of the pier or jetty which extends into the lake at and during periods subsequent to the times to which the former action related.

13. The Court were to be at liberty to draw any inferences which a jury might draw.

The question for the opinion of the Court was, whether the use by the defendants, for the purposes aforesaid, of that portion of the pier or jetty which extends into the said lake was legally justifiable under the circumstances above stated.

Manisty, Q. C. (*Forbes* with him), for the plaintiff. The pier is part of the plaintiff's freehold, and the defendants have no right to use it.

[MELLOR, J. In *Lade* v. *Shepherd* (1) it was held that the owner of the soil of a street which he had dedicated to the public, 171] *might maintain an action against the proprietor of adjoining land who had rested one end of a plank on the road, so as to form a bridge from his premises.]

The defendants may navigate the waters of the lake, but must not touch the soil of the plaintiff. If they wish to land from their steam-vessels, which cannot come close to shore, they should do so by means of small boats. Even placing a gangway from the vessels to land would be a trespass, for cujus est solum ejus est usque ad cœlum, and the public have a mere right of navigation. As the original erection of the pier was a wrongful act of the defendants, being a trespass to the freehold of the plaintiff, and also an obstruction to the navigation of the lake, they cannot justify themselves in using the pier by alleging that it is an obstruction to the public right, and thereby take advantage of their own wrong.

Holker, Q. C. (*Kemplay* with him), for the defendants. If the pier did not exist, the steam-vessels might be brought as near as possible to the shore, and the defendants might land their passengers by means of a boat; and they would have an equal right to do so by means of a gangway. But the pier is there, and is an obstruction. The defendants need not, however, remove it themselves, for they may use it; *Eastern Counties Ry. Co.* v. *Dorling* (2). The defendant there was held justified in passing over the plaintiffs' barge, which was permanently moored in a navigable river so as to obstruct the approach of the defendant to a quay at which he had a right to land. That case would exactly resemble the present, if the plaintiff had erected the pier; but the fact of Agnew having built it makes no real distinction. The obstruction, although created by another, was maintained by the plaintiff; and the maxim that no man shall take advantage of his own wrong does not apply, for the continued existence of the pier is not the fault of the defendants.

Manisty, Q. C., replied.

(1) 2 Str., 1004.

(2) 5 C. B. (N. S.), 821; 28 L. J. (C. P.), 202.

BLACKBURN, J. Our judgment must be for the defendants. I think that to the complaint of the plaintiff a good defence might be pleaded. The admitted facts are, first, that the plaintiff is owner of the soil forming the bed of Lake Ulleswater, including *the part upon which the pier stands; secondly, [172 that the public have a right of highway over the lake, without any restriction as to the use of vessels, except that which is imposed by the breadth and depth of the water. It is well-established law, that where there is a public highway the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land (1). They cannot, of course, pass over the soil of others without leave; and he who has dedicated the road to the public at large has no right to complain that a particular individual has come upon it at one spot rather than another. Consequently, every person in the vicinity of Lake Ulleswater whose land abuts on the edge of the lake has a right to come down to the brink of the water for the purpose of going upon it to exercise the public right of navigation, which is admitted to exist.

Now, I apprehend that where there is a right of that kind the necessary incidents are involved in it, and therefore that, on a navigable river like the Thames, where a person with his barge has to come to the land, it is not essential that he should find some spot where the water is so deep that the barge can float up to the bank close enough to enable him to step ashore, but that he has the reasonable and usual modes of disembarking incidental to the navigation of vessels; if the water were a few feet in depth he would probably use a boat; if very shallow, he could wade, or, if his vessel lay conveniently near, he might place a plank across from it to land. And, therefore, the rule of law is, that the owner of the adjoining land, and those whom he permits to go thereon, have a right to cross to and from their vessels by either wading or walking over a plank, but that they have no right to disturb the soil covered with water, as by permanently fixing anchors. Mr. Askew and the defendants had a right to go on his land before this pier was built, by wading or using small boats, or throwing a plank across from their vessels; they had the public right so to do. We have next to ascertain what is the effect of building the pier.

(1) See the late case of *St. Mary, Newington* v. *Jacobs*, ante, p. 47.

Now, Mr. Askew erected a pier on his own land, as he justly might; but it seems that he carried it out twenty-six feet further on piles driven into the bed of the lake, and so interfered
173] with the ground of the plaintiff, and *committed a trespass, in consequence of which the plaintiff acquired a right to knock down so much of the pier as extended into the lake, or to take it as annexed to and part of his soil. He has adopted the latter alternative; for, bringing this action, he says, in effect, "I have got this pier, and I complain of you, the defendants, for wrongfully causing persons to pass over and upon it, in order to embark and disembark, and sail across Ulleswater lake." It seems to me that he is completely assuming that the pier has become his own, saying, "I use my right of property thus acquired for the purpose of prohibiting any one of the public from going on the lake at that particular spot, and I will bring an action against you if you encourage the public to come." That is as positively maintaining the pier, and maintaining it with the object of preventing the public from getting to the boats, as well can be.

It is not denied that if, as in *Eastern Counties Ry. Co.* v. *Dorling* (1), the plaintiff himself had made and maintained this pier, persons obstructed by it would have a right to step on it to get to the boats. The ordinary plea of obstruction to a right of way is, that the party either broke the obstacle, or removed it, doing no unnecessary damage. Here, any one entitled to embark or disembark at Mr. Agnew's premises might say, "I found this pier preventing me going on or from the lake; I did not knock it down, but put my foot on it to get across." It seems to me that he would be perfectly right to justify thus if the pier had been put up by the plaintiff. Then what possible difference does it make that it was put up by another person under his, the plaintiff's, own eyes? None. Mr. Manisty argues that this is a case of a man taking advantage of his own wrong. Mr. Askew, however, did not cause this pier to be erected for the purpose of obstructing navigation, but for the very purpose of assisting it. Unfortunately, he raised his pier on the land of another, who, instead of using it to facilitate, uses it to interfere with navigation. That, in my opinion, is clearly maintaining it, and puts the plaintiff into the same position as if he had built

(1) 5 C. B. (N. S.), 821; 28 L. J. (C. P.), 202.

it; therefore I think that, if this case turned on a plea, it would be sufficient to allege that the plaintiff maintained the pier in such a place that it was impossible for the *public to use [174 their right to navigate without either knocking down or removing it, and therefore, the defendants, having a right to go, went, doing no unnecessary damage, across the pier. In my judgment, that would be a good plea; and it would not be a good replication to say, "It was erected by you, or by persons to whom you are privy."

Mellor, J. I have come to the same conclusion. I was not at first free from doubt, nor is the doubt yet altogether removed; but I think that my Brother Blackburn's view is quite consistent with good sense, which induces me to agree in the judgment. I am not prepared to dispute in any way the doctrines enunciated by him; my only difficulty has arisen from the circumstances under which this pier was erected, but, on the whole, I think it cannot make any difference whether the pier was built by the plaintiff himself, or by Mr. Askew wrongfully in the bed of the lake. The plaintiff must now be supposed to say: "This pier is mine, and you are wrongfully inducing people to come upon it," which amounts to the same thing as if the plaintiff had erected the pier himself.

Lush, J. I do not share in the doubt that my Brother Mellor has expressed. It appears to me to be a very clear case, and I think the plaintiff is in precisely the same position as if he had built the pier himself. It was erected by wrong on his soil. He might have had it removed at the expense of the wrongdoer. Instead of doing so he exercised the right he undoubtedly had to claim it as part of his own property. He took possession of it, exercised dominion over it, and now claims, by this action, damages in respect of his right of property. That puts him in exactly the same position as if he had built it, or bought it when built. He maintains the pier for the purpose of obstructing the navigation of the lake; the defendants say: "That pier obstructs us and our right of navigation, and so long as it exists, in consequence of that portion of the pier or jetty which extends into the lake having been so made and constructed, and not having been removed, and remaining as it was originally built, we, the

defendants, are prevented from disembarking and landing and embarking passengers and goods without using that portion of
175] the pier or jetty which *so extends into the lake." If the pier were not there they would have the right of bringing steamboats as near their own land as they could, and would have the right of making use of any reasonable means in order to reach the land; it appears to me that is incident to the ordinary right of navigation. They would have been able to do so if the obstruction were not there. That brings the case within *Eastern Counties Ry. Co.* v. *Dorling* (1). The pier prevents the defendants using their right of navigation, and therefore they have a good justification for passing over it; just as in the case of a person placing a gate across a high road, or maintaining it there, and then seeking to bring an action against a person, who could not use his right on account of the gate, for trespass by climbing over it.

Judgment for the defendants.

Attorneys for the plaintiff: *Bell, Brodrick, & Grey.*
Attorneys for the defendants: *James, Curtis, & James.*

Stimson v. Farnham.

Nov. 25, 1871.

Law Reports, 7 Queen's Bench, 175.

Sheriff, Action against — False Return — Estoppel — Actual Damage.

The plaintiff, an execution creditor, delivered a writ of fi. fa. to the sheriff, who proceeded to execute it by seizing goods upon the premises and apparently the property of the execution debtor, but which were then, in fact, in possession of the holder of a bill of sale to whom they had been previously assigned. The sheriff remained on the premises until dismissed by the plaintiff's attorney, and, being directed to return the writ, made a return, that he had seized goods of the debtor and kept them until ordered by the plaintiff's attorney to withdraw from possession. To an action brought by the plaintiff against the sheriff for not levying under the writ, and for a false return, the defendant pleaded (inter alia), nulla bona, and at the trial, set up, as his sole defence, the bill of sale, which the jury found to be valid; and a verdict was entered for the defendant: —

Held, that actual damage was necessary to support the action; that the defendant was not estopped by his return from proving that the goods seized did

(1) 5 C. B. (N. S.), 821; 28 L. J. (C. P.), 202.

not belong to the debtor; that as they were found to be the property of the assignee they were not available for sale under the execution; and that, therefore, the plaintiff had sustained no damage from the conduct of the sheriff, and could not maintain the action.

DECLARATION, against the defendant as sheriff, for not levying under a writ of fi. fa., and for a false return that he had seized the *goods and chattels, in his bailiwick, of the execution [176 debtor, and kept them safe until he received from the attorney of the plaintiff an order to withdraw from possession of the same.

Pleas: 1. Not guilty. 2. Except as to the claim in respect of the return, nulla bona. 3. That after seizure of the goods by the defendant the plaintiff ordered him to withdraw from possession, whereupon the defendant did so, and made the return complained of.

Issue thereon.

At the trial, before Mellor, J., at the sittings in Middlesex in Easter term, 1871, it appeared that the plaintiff had recovered judgment against one Henry Fellows, for 74*l.*, and had delivered a writ of fi. fa. to the defendant, the sheriff of Leicestershire, commanding him to levy that sum. The sheriff's officer accordingly went with the writ to the premises of the execution debtor, and seized goods there, which were, however, then in the possession of a claimant under a bill of sale. At the request of the plaintiff's attorney the sheriff's officer remained on the premises until dismissed by him. In the mean while the goods were sold under the bill of sale. The plaintiff demanded a return to the writ, and the defendant thereupon returned that he had seized the goods and chattels of Henry Fellows, and kept them safe in his possession until the 19th of September, 1870, when he received from the attorney of the plaintiff an order to withdraw from possession, and that he then withdrew from such possession. In support of the second plea (upon which alone he relied), the defendant adduced evidence to prove that all the goods apparently belonging to the execution debtor in his bailiwick had, prior to the seizure, been assigned under the bill of sale.

The learned judge asked the jury whether the assignment by the bill of sale was valid or not; they found it to be valid; and a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff for 77*l.*

A rule was accordingly obtained, on the ground that the defendant was concluded by his return.

Mundell, Q. C., and *Abbott*, showed cause. As the assignment was valid the goods did not belong to the execution debtor; therefore the plaintiff has suffered no loss through the conduct 177] of the defendant, *and cannot maintain the action. It is the duty of a sheriff to execute a writ directed to him, and to make a true return. But this duty is only imposed upon him for the benefit of the creditor; and if he can absolutely negative the possibility of any advantage accruing to the creditor from the performance of his duty, the creditor will not be entitled even to nominal damages: Mayne's Law of Damages, p. 4; *Williams* v. *Moslyn* (1); *Wylie* v. *Birch* (2). Secondly, the defendant was not estopped by his return from proving that the goods seized were not the property of the debtor: *Remmet* v. *Lawrence* (3). There a sheriff returned to a fi. fa., that by virtue of a writ previously delivered to him by another creditor he had seized goods of Webb, the debtor; and to an action for a false return he pleaded not guilty, and other pleas in denial of there having been goods of Webb, which were, or might have been seized under the plaintiff's writ. It was held that the sheriff was not estopped from showing that the goods did not belong to Webb.

[BLACKBURN, J. In *Levy* v. *Hale* (4) Williams, J., points out that in *Remmett* v. *Lawrence* (5) Lord Campbell says, "If he had returned that he had taken Webb's goods, and had them in his hands for want of buyers, he would have been estopped from denying that the goods were Webb's," and, upon counsel arguing that the observation of the Chief Justice was an obiter dictum without authority, Williams, J., cited *Mildmay* v. *Smith* (6); *Clerk* v. *Withers* (6); adding that it was "too strong to say that there is no authority in favor of what Lord Campbell says in *Remmett* v. *Lawrence* (5)."]

The judgment, however, in *Levy* v. *Hale* (7) supports the present contention. The doctrine of estoppel, stated in *Pickard* v. *Sears* (8), does not apply to the present case, for the position of

(1) 4 M. & W., 145.
(2) 4 Q. B., 566.
(3) 15 Q. B., 1004; 20 L. J. (Q. B.), 25.
(4) 29 L. J. (C. P.), at p. 130.
(5) 2 Wms. Saund., 343.
(6) 2 Ld. Raym. at p. 1075.
(7) 29 L. J. (C. P.), 127.
(8) 6 Ad. & E. at p. 474.

the plaintiff was not altered by the false return: 2 Sm. L. C., 6th ed., p. 769; notes to *Duchess of Kingston's Case.* The onus of showing actual damage from the falsehood of the return rests on the plaintiff, who has not proved any. The sheriff is a ministerial officer, and *is not estopped by the formal return [178 which he is compelled to make.

Field, Q.C., and *J. W. Mellor*, in support of the rule. The defendant was estopped by his false return, as the plaintiff acted upon it by bringing the action.

[BLACKBURN, J. That is an attempt to extend the doctrine in *Pickard* v. *Sears* (1) much further than it has ever been carried.]

It might well go to that length. In *Field* v. *Smith* (2), a sheriff had levied and sold goods under a fi. fa., and, after receiving information that the debtor had petitioned the Insolvency Court, returned fieri feci; and it was held that he was bound by that return. The passage above cited from the judgment of Lord Campbell in *Remmett* v. *Lawrence* (3) is much in favor of the present plaintiff. Two courses were open to the sheriff, he might either have returned nulla bona or have interpleaded. He adopted neither. Matters subsequent may defeat a return, as in *Standish* v. *Ross* (4); but there was no matter subsequent in this case. All the facts were known to the defendant when he deliberately made his untrue return. At least he might have applied to amend it.

COCKBURN, C.J. I am of opinion that this rule must be discharged. The action is founded on tort, for a wrong done by the sheriff in making this return, which was in one sense a false return. Now the rule respecting such actions against a sheriff is, that, not only must a wrongful act have been committed, but damage must have been thereby caused, in order to entitle the person injured to maintain the action. That fundamental rule would apply here, unless the present case is shown to be excepted from it. It has been argued that this being an action against a sheriff for a false return, he is concluded by the return he has made. We must look to see whether there is any sufficient authority for saying that this case forms an exception to the general principle governing actions of this character. The

(1) 6 Ad. & E. at p. 474.
(2) 2 M. & W., 388.
(3) 15 Q. B., 1004; 20 L. J. (Q. B.), 25.
(4) 3 Ex., 527.

authority most relied upon is a dictum by Lord Campbell in *Remmett* v. *Lawrence* (1), where, I would remark that, it was altogether an obiter dictum, and quite unnecessary to the decision of
179] the case. Therefore, *although respect is due to anything said by that distinguished judge, yet the dictum in question will not bind us if we see our way, on principle, to a different conclusion. The authorities relied on as supporting that dictum are those referred to by Williams, J., in *Levy* v. *Hale* (2), viz., *Mildmay* v. *Smith* (3), and *Clerk* v. *Withers* (4). Now, in *Mildmay* v. *Smith* (3) the sheriff had suffered goods seized under an execution, and returned by him as of a certain value, to be rescued out of his hands, and the Court held that a scire facias lay against him of the money according to the value returned. It was there argued that the sheriff is in no case chargeable for the debt on a fieri facias, unless he returns that he has the money in his hands . . . "Sed non allocatur; for the sheriff by his return of the rescue has put the plaintiffs to the end of their suit; for they cannot sue a new execution, except only for the surplus of their debt, over and above the 160*l.*; and the Court cannot award a venditioni exponas, because it appears that the goods are out of the sheriff's hands: 33 Hen. 6, 36a. Therefore the plaintiffs ought to have a writ of debt, or scire facias, on the return against the sheriff . . . or, as here, otherwise they are without remedy . . . . . But true, it is, if the sheriff do not misbehave himself, he is not chargeable in debt or scire facias, unless it appears by his return that he has the money in his hands; as if he returns, 'I have taken, and caused to be seised into my hands, goods and chattels to the value of 160*l.*, which remain in my hands for want of buyers;' there, on this return, he is not chargeable in debt or scire facias, because he has not misbehaved himself, but has done his duty, for there is no default in him." Now observe what follows. "But it is otherwise here, for he has suffered the goods to be rescued out of his hands, which is a great fault in him. Wherefore the judgment was affirmed as aforesaid." In the other case of *Clerk* v. *Withers* (4), Lord Holt said, "The sheriff is answerable for the value of the goods after he has seized them, and is bound to sell them at all events, and he is bound to the value he has

(1) 15 Q. B., 1004; 20 L. J. (Q. B.), 25.
(2) 29 L. J. (C. P.), at p. 130.
(3) 2 Wms. Saund., 343.
(4) 2 Ld. Raym., 1075.

returned them to be of. And though the goods are lost or rescued from him, he is bound, not to that value which they may after appear or be found to be of, but to the value *he returned them to be of; that is the value he is bound to, [180 and an action of debt lies against him for that value. And that is the case in Saunders' Reports (2d part, 343, *Mildmay* v. *Smith*), and by the same reason he is compellable to sell them according to that value." Both those cases were cases of scire facias, and neither was like the present, which is an action of tort; therefore, I think those authorities do not apply, and I find no ground for saying that the tort in the case we have now to consider forms any exception to the general rule already stated. Here it is clear that no damage was sustained, for the moment it was ascertained that the bill of sale was bona fide and valid, no matter what the return of the sheriff had been, the goods were not available, they could not have been sold for the benefit of the plaintiff, the execution creditor, and, therefore, he has not suffered. It may be that the sheriff is to some degree blameable for having taken the course of making this return, or for not adopting the usual and plainly available remedy of interpleading; but we are not to consider how far the sheriff is open to reprehension on that account. The question is whether the present case has been shown to be any exception to the general rule in actions of tort brought against a sheriff. I find no authority for saying that it is, and the rule must therefore be discharged.

BLACKBURN, J. I am also of opinion that the rule must be discharged. An action against a sheriff for a false return will not lie unless actual damage has been caused to the plaintiff; and in the present case, on the finding of the jury that the goods seized were not the debtor's goods, there was no damage, and the action will not lie. But, then, was the sheriff estopped by his return? The general rule is, that what a man says is evidence against him, and nothing more. He may show that what he said was a wilful untruth. Nevertheless there are a good many cases in which a man is not permitted to contradict his assertions, and in which he is precluded, or, in technical language, estopped from doing so; as in the cases of *Pickard* v.

Sears (1) and *Freeman* v. *Cooke* (2). But I do not see anything to bring this return of the sheriff that the goods seized were goods 181] of the debtor,—a mere averment preliminary *to his answer,—within the principle of estoppel, and I do not understand why the fact of his being sheriff should make it operate as an estoppel. Where the sheriff has made a return by which he shows a state of things such as that the plaintiff is entitled to receive the money, there the question is quite a different one, for the sheriff says he has money in his hands belonging to the plaintiff. The plaintiff, according to the record as it then stands, is entitled to have the money. *Mildmay* v. *Smith* (3) was not an action for false return. The sheriff had returned that he did seize goods of the debtor, and should have levied the debt, but that they were rescued out of custody. The plaintiffs brought an action on scire facias, and the Court of Common Pleas held that the sheriff was bound by his return, and, consequently, that the plaintiffs were entitled to have execution against him for the value of the goods, as he should have been prepared with sufficient force to resist those people who came to the rescue. Then error was brought, and it could not be denied that the return was bad, but an attempt was made to impugn the judgment of the Court below, because credit had been given for the value of the goods, as returned by the sheriff; to which the answer of the Queen's Bench in effect was, "He has by his own fault put the plaintiffs to an end of their suit; for they cannot sue a new execution, except only for the surplus of their debt over and above the sum returned, and we cannot order the goods to be sold because they are out of the sheriff's hands." And so on those proceedings the sheriff was estopped. That seems reasonable enough. Again, the case of *Clerk* v. *Withers* (4) related to quite a different matter: Lord Holt there, considering the effect of the execution creditor dying after seizure and before sale, points out that the position of the creditor was altered by the goods having been seized: for that he had no further remedy against the judgment debtor, but must proceed against the sheriff, who was bound to sell the goods, and was bound to the value he had stated them to be of in his return, and was not hindered from selling by the death of the exe-

(1) 6 Ad. & E. at p. 474.
(2) 2 Ex., 654.
(3) 2 Wms. Saund., 343.
(4) 2 Ld. Raym., 1075.

cution creditor. And *Mildmay* v. *Smith* (1) was cited. Neither of those cases are authorities for saying that the present defendant was estopped by his return. Then in *Remmett* v. *Lawrence* (2) is a *passage which is the only authority supporting [182 the argument for the plaintiff. Lord Campbell, C.J., is reported to have said that if the sheriff had returned that he had got the debtor's goods, he would have been estopped. The observation may possibly have been misunderstood, but more probably, the learned judge in forgetfulness used inaccurate language. The dictum was cited in the case of *Levy* v. *Hale* (3), by Williams, J., whose observations merely show that he had not made up his mind that Lord Campbell was not right. But the two cases he cited do not support the dictum, nor do I see any principle upon which it could be supported. I am therefore of opinion that this rule must be discharged.

MELLOR, J. I am of the same opinion. When the rule was moved we thought it should not be granted, but *Remmett* v. *Lawrence* (2) was cited, and we gave this opportunity for examining the dictum upon which the plaintiff's counsel mainly relied. I do not regret that we did so, as the question has now been thoroughly discussed, and we find the authorities satisfactorily show that in actions such as this against a sheriff there is no exception to the ordinary rule that not only must a tort have been committed, but actual damage must have resulted therefrom in order to entitle the plaintiff to recover. There was, in this case, no damage, and consequently the rule must be discharged.

Rule discharged.

Attorney for plaintiff: *J. Briggs.*
Attorneys for defendant: *Robinson & Preston.*

(1) 2 Wms. Saund., 343.
(2) 15 Q. B., 1004; 20 L. J. (Q. B)., 25.
(3) 29 L. J. (C.P.) at p. 130.

196] *[IN THE EXCHEQUER CHAMBER.]

Nov. 17, 1871.

MOUNTSTEPHEN v. LAKEMAN.

Law Reports, 7 Queen's Bench, 196.

Statute of Frauds (29 *Car.* 2, *c.* 3) *s.* 4—*Promise to be answerable for debt of Another—Evidence of Promise to be Primarily liable.*

The plaintiff had been employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed the board gave notice, under 11 & 12 Vict. c. 63, s. 69, to the occupiers of the adjoining houses, to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had expired, the plaintiff, having completed the sewer, was about to leave the place with his carts, &c., when the defendant sent after him, and the following conversation took place. The defendant said, "What objection have you to making the connections?" The plaintiff replied, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the board; and sent in the account to the board debiting them with the amount. The board refused payment on the ground that they had not authorized the order; and after more than two years, the account being still unpaid, the plaintiff made a claim and brought an action against the defendant.

The above evidence having been given by the plaintiff, the defendant denied that any conversation of the kind deposed to ever took place; the jury found that it did take place, and a verdict passed for the plaintiff, leave being reserved to enter a nonsuit.

The Court of Queen's Bench made the rule absolute to enter a nonsuit, on the ground that the conversation did not amount to an undertaking of the defendant to be primarily liable for the work; but only to a promise that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not, and that this was a promise to be answerable for the debt of another person within s. 4 of the Statute of Frauds, and not being in writing could not be enforced. On appeal:—

The Court of Exchequer Chamber reversed the judgment, on the ground that there was evidence on which the jury might have found that the defendant agreed to be primarily liable.

* APPEAL by the plaintiff from the decision of the Court of Queen's Bench, making absolute a rule to enter a nonsuit.

The following is the substance of the pleadings and case:—

First count: That defendant was chairman of the local board of health of Brixham, and in consideration that plaintiff would do certain work for the board at request of defendant, as and assuming to be agent of the board, defendant promised plaintiff

that he was authorized by the board to make such request; that *plaintiff did the work accordingly, but defendant turned [197 out not to be authorized, and plaintiff was unable to make the board pay.

Second count: Alleging defendant's promise to be that he would procure a contract from the board, whereby they should be bound to pay for the work.

Money counts: For work and labor, &c.

Count, added at the trial, alleging defendant's promise to be that, in consideration that plaintiff would do the work for the board, defendant promised to pay for the work, if the board should at any time refuse to pay.

Pleas to the money counts: Never indebted, and to the other counts, 1. That defendant did not promise as alleged, 2. That plaintiff did not do the work at defendant's request as alleged.

At the trial before Kelly, C. B., at the Devon Summer Assizes, 1870, the following facts were proved:—The defendant was chairman of the Brixham Local Board of Health. The plaintiff, a builder and contractor, was employed, in 1866, by the board to construct certain main sewage works in the town. On the 19th of March, 1866, notice was given by the board under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, to the owners of certain houses to connect their house drains with the main sewer within twenty-one days. Before the expiration of the twenty-one days, Robert Adams, the surveyor of the board, proposed to the plaintiff that he should construct the connections between the house drains and the main sewer. The plaintiff said that he was willing to do the work if the board would see him paid. On the 5th of April, that is, before the expiration of the twenty-one days, the construction of the connections was commenced by the plaintiff.

The plaintiff stated in evidence that on the day on which the construction of the connections was commenced, and about an hour previous to the commencement, he was leaving Brixham with his carts and men, after the completion of the main sewer, when Adams stopped him, and requested him not to go away as there was more work to be done. The plaintiff asked who was to be responsible for the payment, and Adams said that the defendant was waiting to see the plaintiff about it. The plaintiff then had an interview with the defendant, at which the

following conversation took place: The defendant said, "What
198] objection have you *to making the connections? Plaintiff said, "I have none; if you or the board will order the work or become responsible for the payment." The defendant replied, "Go on, Mountstephen, and do the work, and I will see you paid."

The plaintiff constructed and completed the connections in question in the months of April and May, 1866, under the general superintendence of the surveyor of the board; and the plaintiff, on the 5th of December, 1866, sent in an account to the board debiting them with the amount. The board disclaimed responsibility on the ground that they had never entered into any agreement with the plaintiff, nor by any resolution or order authorized any officer of the board to agree with him for the performance of the work in question.

The plaintiff, for the first time, on the 20th of November, 1869, through his solicitor, applied to the defendant for payment of the work, and the defendant having refused to pay him, commenced this action.

At the close of the plaintiff's case, the counsel for the defendant claimed a nonsuit on the ground that there was no evidence of any liability on the part of the defendant. The learned judge declined to nonsuit, stating his opinion there was evidence to support a count in the form above given, and which he gave the plaintiff leave to add.

The defendant's case was then entered upon, and the defendant denied that any conversation of the kind deposed to by the plaintiff had ever taken place.

The Chief Baron left it to the jury to say whether the conversation did take place; and the jury returned a verdict for the plaintiff for the amount claimed.

Leave was reserved to the defendant to move to enter a nonsuit, if it should appear that there was no evidence, either upon the original declaration or upon the declaration as amended, which ought to have been left to the jury.

The defendant obtained a rule accordingly, to enter a nonsuit, on the ground that there was no evidence of any original liability on the part of the defendant to the plaintiff for the work to be done; or for a new trial, on the ground that the verdict was against the evidence.

*The Court of Queen's Bench afterwards made the rule [199 absolute to enter a nonsuit, on the ground that the defendant's engagement did not amount to an undertaking to be primarily liable for the work; but only to a promise, that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within s. 4 of the Statute of Frauds, and not being in writing was void (1).

The question for the Court of Appeal was, whether the defendant is entitled to have a nonsuit entered.

Nov. 28. *A. Charles* (*Lopes, Q.C.*, with him), for the plaintiff. The decision of the Court of Queen's Bench, making the rule absolute to enter a nonsuit, was erroneous. All that was left to the jury was, whether the conversation spoken to by the plaintiff took place or not: this they found in the affirmative; and therefore the question is, what was the contract which this conversation evidenced, coupled with the other circumstances of the case? There was ample evidence from which the jury might have found either an original liability in the defendant, in which case the plaintiff would be entitled to a verdict on the added count, or the money counts; or else there was evidence to sustain a verdict on the first and second counts. But the main argument in the court below proceeded on the question under the Statute of Frauds. The Court were wrong in holding such a promise to be within s. 4 of the Statute of Frauds. In order to make a contract a promise to be answerable for the debt, default, or miscarriage of another, there must be a debt, default, or miscarriage of a third person, for which that person has already or does thereafter become liable, and it is not sufficient, as the Court of Queen's Bench held, that the promiser and promisee both expect that by possibility a third party will eventually become liable. [On this point he cited the following authorities: Chitty on Contracts, 8th ed., p. 475; 2 Parsons on Contracts, p. 301; Brown on the Statute of Frauds, ss. 11, 155, 156 (2d ed.); *Birkmyr* v. *Darnell* (2); *Read* v. *Nash* (3); *Kirkham* v. *Marter* (4); *Harris* v. *Huntbach* (5); *Hargreaves* *v. *Par-* [200

(1) Law Rep., 5 Q. B., 613.
(2) 1 Sm. L. C., 274 (6th ed.).
(3) 1 Wils., 305.
(4) 2 B. & A., 613.
(5) 1 Burr., 373.

sons (1); *Couturier* v. *Hastie* (2); *Cripps* v. *Hartnoll* (3); *Green* v. *Cresswell* (4); Williams' Notes to Saunders, pp. 230–234; and *Goodman* v. *Chase* (5); but the judgment of the Court renders it unnecessary to do more than refer to them.] Secondly, the promise of the defendant, coupled with the surrounding circumstances, proved the first or second counts within the principle of *Collen* v. *Wright* (6), *Simons* v. *Patchett* (7), and *Cherry* v. *Colonial Bank of Australasia* (8).

Nov. 29. *H. T. Cole, Q.C.* (*Pinder* with him), for the defendant. The contract to be deduced from the conversation, coupled with the position of all parties at the time, is, that the owners or occupiers of the houses were the parties to be primarily liable, and the promise of the defendant, "I will see you paid," amounted to no more than a guarantee; *Keate* v. *Temple* (9). Why should the defendant make himself primarily liable? The conversation could only import what the judges in the court below said it did. [He cited notes to *Birkmyr* v. *Darnell* (10); Throop on Verbal Contracts, vol. i., cc. 7 and 8, pp. 214, 256; *Peckham* v. *Faria* (11).]

Charles, in reply. The supposed liability of the householders would put the contract of the defendant precisely on the same footing as the supposed liability of the local board, which was assumed by the Court of Queen's Bench; and the arguments already addressed to the latter state of facts, are equally applicable if the supposed liability be that of the householders; in either case it is not within the Statute of Frauds.

[WILLES, J. Suppose this to be put down in writing, but not signed by C.: "A. having ordered a house to be built by B., B. is desirous of having the security of some third person, and C. is willing to become surety for A., and requests B. to go on with the house accordingly." B. builds the house; but it turns out, when the house is built, that the order supposed 201] by B. and C., to *have been given by A., was not by A., but by X., who had no authority from A., and, consequently,

(1) 13 M. & W., 561, 570.
(2) 8 Ex. 40; 22 L. J. (Ex.), 97.
(3) 4 B. & S., 414; 32 L. J. (Q. B.), 381.
(4) 10 A. & E., 453.
(5) 1 B. & Ald., 297.
(6) 8 E. & B., 647; 27 L. J. (Q. B)., 215.
(7) 7 E. & B., 568; 26 L. J. (Q. B.), 195.
(8) Law Rep., 3 P. C., 24.
(9) 1 B. & P., 158.
(10) 1 Sm. L. C., 274 (6th ed.).
(11) 3 Doug., 13.

there was no liability of A. The contract would be void, independently of the Statute of Frauds, because C. never meant to become liable unless A. was primarily liable; both parties being mistaken, there is no contract at all.]

In the present case there was no such common error; both parties knew that neither the owners nor the local board had given any orders at the time the conversation between the plaintiff and defendant took place.

WILLES, J. [after going minutely through the facts of the case.] At the time the conversation took place it was known, both to the plaintiff and the defendant, that the owners were not liable, and had not interfered in the matter. The plaintiff did not doubt the responsibility of the board in respect of ability to pay, and he wanted no guarantee for this work any more than for the work which he had already done for the board; but he knew he had not got the order of the board, and so did the defendant, although the contrary seems to have been assumed by the Court of Queen's Bench. Therefore, it is pretty clear that the meaning of the conversation could not be that the defendant would guarantee payment by the board; but it might mean that he had, or would obtain, the order of the board, in which case the principle of *Collen* v. *Wright* (1) would apply, and the defendant might be liable on the first or second count. But it was competent to a jury to find,—and I need go no further than that, though I think it would have been the proper conclusion to draw,—that the meaning of the answer of the defendant was not "I will be liable as surety for the board, if they become liable to you," making the contract one of suretyship; but "Whether the board be liable or not, do the work and you shall be paid;" that is, "I undertake to pay you for the work, unless you shall happen to be paid either by the board or by the owners, assuming they come forward and pay, though they are not liable." That appears to me to be the result of the conversation. It is a bargain, therefore, by the defendant to pay for the work, though it was known that there was no person liable at the time, and whether a third person should become liable in future or not, *that is, whether or not there was, or [202 might be, a third person who could be liable for a debt, or

(1) 8 E. & B., 647; 27 L.J. (Q. B.), 215.

guilty of a default or miscarriage in the matter. And it is only in respect of such a third person that the Statute of Frauds applies.

The leading case upon the application of the Statute of Frauds has generally been considered to be *Birkmyr* v. *Darnell* (1), and in the note to Mr. Evans's edition of Salkeld's Reports it is stated, that, "from all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void, except in writing." I think that may very well be modified: "Or, if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the promise is void:" so as to include the case which I put to Mr. Charles of persons wrongly supposing that a third person was liable, and entering into a contract on that supposition. If, in such a case, it turned out that the third person was not liable at all, the contract would fail, because there would be a failure of that which the parties intentionally made the foundation of the contract. The lex contractus itself would make an end of the claim, and not the application of the Statute of Frauds, whether the contract was in writing or not, and whether signed or not. The law of contract gives you, as foundation, that a person was taken to be liable, and that the suretyship was a suretyship in respect of that liability. Take away the foundation of principal contract, the contract of suretyship would fail. Again, if there was a contract with reference to a liability, not existing at the time, by reason of the debt not being due at the time, but being payable in futuro, that would come under the word default, and there would be no difficulty about that. So, if there was a contract, "If A. B. will employ you to do work, I promise to become surety for him that he shall pay you;" in that case the promise would clearly come within the statute, because, although there was no liability existing at the time when the promise was made, there was a liability contemplated as the foundation for the promise of the defendant. It was a contract of suretyship in respect of a liability to be created; but if the liability were not created, there again the lex con-
203] tractus would prevail. There would *be the condition precedent to the arising of any liability as surety, that there

(1) 1 Salk., 27.

should be a principal debtor established. In all these cases, no doubt, one agrees thoroughly with what was laid down in the Court of Queen's Bench, because you have the case of principal debt contemplated by the parties, and suretyship founded in respect of that principal debt. But in order to bring the case within that rule, you must first of all show that the parties did intend that there should be a principal debtor. In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming surety for a liability, either past, present, or future, upon the part of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, are, or shall be liable or not: "Do that work now, and you shall be paid for that work." So that it is a case of principal liability.

We were asked by Mr. Cole to look at a variety of points in this case, upon which he suggested that the true result ought to be a new trial, and not the discharging of the rule directing that a nonsuit should be entered; but the arguments upon that head appear to be excluded by the reservation at the trial, which was to enter a nonsuit, if it should appear that there was no evidence, either upon the original declaration or upon the declaration as amended, which ought to have been left to the jury; and the rule was to enter a nonsuit, on the ground that there was no evidence of an original liability on the part of the defendant. No objection was taken to the form in which the question was left. Moreover, the question for the opinion of the Court of Appeal is stated to be, whether or not the defendant is entitled to have a nonsuit entered; that is, whether, at the end of the plaintiff's case, the Lord Chief Baron would have been justified in directing that the plaintiff should be nonsuited.

I do not think it necessary to make any further remarks upon the judgment of the Court below. It is quite clear from the report, that the judgment is founded upon the notion of such a case as I put to Mr. Charles, namely, the notion that, upon the facts, *the parties must be taken to have supposed the ex- [204
istence of a principal contract with the board, or, taking Mr.

Cole's view, with the owners, before there could be any contract arising with the defendant. It is a "supposed liability." The facts are such that the jury might have thought, as I apprehend, correctly, that it was a supposed non-liability of the board that led to what took place between the plaintiff and the defendant. In the judgment of Mr. Justice Blackburn, which I do not presume to criticise, except for the purpose of finding out, as I am bound to do, the reasons on which he proceeded, there is the passage: "We must now take it that the plaintiff, when he agreed to do the work, thought he had got the order of the board, but that he would not have done the work without, in addition to the order of the board through their chairman, the personal promise of the defendant himself that he would see him paid." I am not at all criticising the law as laid down there, except in so far as it conflicts with *Birkmyr* v. *Darnell* (1); but dealing with that judgment upon the question of fact, upon which it is founded, I humbly conceive that it assumes the fact differently from what it appears upon the case as laid before us. It assumes that the plaintiff thought he had the order of the board, whereas it appears upon the case that the plaintiff would not go on because he thought he had *not* got the order of the board. The result appears to be, that the jury might well, upon the evidence, have found an original liability in the defendant, a liability not falling within the provision of the Statute of Frauds. A nonsuit, therefore, could not have been sustained, and we are bound to reverse the judgment.

CHANNELL, B. I agree with my Brother Willes in thinking that the judgment of the Court of Queen's Bench must be reversed, and that the verdict must be entered for the plaintiff.

KEATING, J. I am of the same opinion. The simple question upon which I deliver an opinion is, that the evidence at the trial was such that the judge might have left to the jury the question, whether there was an undertaking by the defendant in the nature of a primary liability, or whether the defendant's undertaking amounted to a contract of suretyship only, such as 205] would *require a writing under the Statute of Frauds. It appears to me, for the reasons already given by my Brother

(1) 1 Salk., 27.

Willes in detail, that there was evidence which could not and ought not to have been withheld from the jury as evidence of a primary liability. The Court of Queen's Bench appear to have gone on the fact that there was no such evidence that ought to have been left to the jury, and held that the want of writing to satisfy the Statute of Frauds was fatal to the plaintiff's case.

PIGOTT, B. I cannot say that I have not felt some hesitation in the course of the case, but in the result I have come to the conclusion that there was evidence which the Lord Chief Baron could not have withdrawn from the jury, whether the defendant did give an order and take upon himself a primary liability to pay for this work. The words, "I will see you paid," as it seems to me, may mean either one thing or the other. "I will see you paid," that is," I will pay you," or, "You shall be paid." But I do not think these words are necessarily to be taken in the sense Mr. Cole contended for, as meaning, "I will see that somebody else pays you," or that "your principal debtor pays you; and if he does not, I will be the surety for payment." I do not think that phrase, "I will see you paid," has any hard and fast meaning of that kind; it must depend on the other facts of the case.

CLEASBY, B. I have come to the same conclusion. We are to give our judgment upon the case as stated on appeal. It is stated that the opinion of the jury was taken whether the plaintiff's version of the conversation was correct or not, and the jury must be taken to have found that it was. If that conversation did take place, then at the termination of the plaintiff's case, as has been pointed out by my Brother Willes, there was evidence to go to the jury of a primary liability on the part of the defendant. It is very unfortunate that a case should turn upon such a finding of the jury, whether particular words were made use of or not, four or five years ago. Nothing can be more unsatisfactory than attempting to decide the rights of parties upon the legal construction of language, referring to what took place so long ago, where everything may turn on the use of a particular word. But we cannot help *that in this case, and [206
we must take it that those expressions were made use of. Then what we have to deal with is this simple question: Does that

conversation, coupled with the surrounding circumstances, warrant the conclusion that the defendant intended to make himself primarily liable, or liable only in the failure of somebody else who was the principal debtor?

It seems to me quite clear, from the statement in the case, that there was no question whatever about the employment by the occupiers. The plaintiff would have nothing to do with them. It is quite true, as Mr. Cole has said, that in one sense he wanted to be guaranteed against them; but in reality he would not take them as his employers at all, and therefore he wanted to be secure of payment, in case the work was done; and it seems to me that, at all events, the conversation amounted to evidence that the defendant either promised that the board should order the work, or "you may take it as my order, and I will see you paid;" and this was quite consistent with the plaintiff's conduct afterwards; because he took it as an assurance that the board would give the order, as the defendant was the chairman of the board. It is not necessary to refer to the authorities at all, because if the case has this complexion the authorities do not apply. I think that the conversation is quite capable of this construction, without going so far as to say that is the construction I should have put upon it. That being so, I think we must discharge the rule in the court below.

KELLY, C.B. [who had been absent during the argument.] Having tried this cause and read the case on appeal, I must say that I entirely concur with the judgment pronounced by this Court.

Judgment reversed.

Attorney for plaintiff: *G. E. Philbrick, for W. & C. Kitson, Torquay.*

Attorneys for defendants: *Church, Sons, & Clarke, for Francis & Baker, Newton Abbott.*

The statute of frauds relating to promises to answer for the debt, default, or miscarriage of another, applies only where the promissor stands in the relation of a surety for some third person *who is the principal debtor*.

Johnson v. *Gilbert*, 4 *Hill*, 178; *Wainright* v. *Straw*, 15 *Verm.*, 215; *Armstrong* v. *Flora*, 3 *Monr.* (*Ky.*), 43; *Mead* v. *Keyes*, 4 *E. D. Smith, Com. Pl.*, 510.

Where the defendant inquired of the plaintiff the terms on which he would let C. (his nephew) a news carrier, have newspapers to sell, and on being told

the terms, said, if my nephew calls for the papers I will be responsible for the papers he shall take, it was held that this was an *original* and *absolute* contract on the part of the defendant, and not a collateral agreement, for the debt or default of C. and, therefore not within the statute of frauds.

Chase v. *Day*, 17 *Johns.*, 114. To the same effect, see *Pennell* v. *Pentz*, 4 *E. D. Smith, Com. Pl.*, 642; *Devlin* v. *Woodgate*, 34 *Barb.*, 252; *Flanders* v. *Crolius*, 1 *Duer*, 206; *Hanford* v. *Higgins*, 1 *Bosw.*, 441; *Graham* v. *O'Neil*, 2 *Hall*, 474; *Willson* v. *Burr*, 25 *Wend.*, 386; *Stilwell* v. *Otis*, 2 *Hilton*, 148, 7 *Abb. Prac. Rep.*, 431; *Busbee* v. *Allen*, 31 *Vermont*, 631; *Upper Locks* v. *Abbott*, 14 *N. H.*, 157; *Downing* v. *Roberts*, 35 *Barb.*, 464; *Briggs* v. *Evans*, 1 *E. D. Smith, Com. Pl.*, 192; *Gardner* v. *Hopkins*, 5 *Wend.*, 23; *Quintard* v. *Dewolf*, 34 *Barb.*, 97; *Baker* v. *Dillman*, 12 *Abb.* 210, 21 *How.*, 445; *Porter* v. *Leghorn*, 2 *Bibb.* (*Ky.*), 63; *Chapin* v. *Lapham*, 20 *Pick.*, 467; *Collins* v. *Rose*, 10 *Leigh*, (*Va.*), 114; *Faires* v. *Lodane*, 10 *Ala.*, 50; *Perrin* v. *Leachman*, 10 *Ala.*, 140; *Beaman* v. *Russell*, 20 *Vt.*, 505; *Arbuckle* v. *Hawks*, 20 *Vt.*, 538; *Wallace* v. *Wortham*, 25 *Miss.*, 119; *Hall* v. *Wood*, 4 *Chand.* (*Wis.*), 61; *Pearce* v. *Blagrave*, 30 *Eng. L. & Eq.*, 510; *Rand* v. *Mather*, 11 *Cush.* (*Mass.*), 1; *Walker* v. *Norton*, 29 *Vt.*, 226; *Mease* v. *Wagner*, 1 *McCord* (*S.C.*), 395.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXXV VICTORIA.

Nov. 25, 1871.

*The North British and Mercantile Insurance Company v. Moffatt and another.

25]

Law Reports, 7 Common Pleas, 25.

Policy of Fire Insurance — Insurable Interest — "Merchandise in Trust or on Commission for which the Assured are responsible" — Loss.

A policy of fire insurance expressed the insurance to be on "merchandise the assured's own, in trust or on commission for which they are responsible" in or on certain specified warehouses, vaults, wharves, &c. Whilst the policy was in force certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger; the assured had purchased them from the importer, and the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—

Held, that the policy applied only to goods belonging to the assured, or for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy.

This was an action brought by the plaintiffs to recover from the defendants a sum of 636*l.* 13*s.* 7*d.* which the plaintiffs alleged to have been paid by them to the defendants in excess of the sums due on certain policies of insurance, and which the defendants had agreed to repay to the plaintiffs in the event of that allegation being well founded.

By consent of the parties a case was stated for the opinion of the Court, without pleadings, the substance of which is as follows :—

The plaintiffs are an insurance company, and the defendants are wholesale tea merchants, carrying on business in the city of London. In the year 1865 the defendants effected two policies of insurance with the plaintiffs, by which the plaintiffs, in consideration of an annual premium, insured from loss or damage by fire, as from the 29th of September, 1865, subject to conditions in the policies contained, to an amount not exceeding on each policy 3500*l.*, "merchandise (jute, petroleum, and its products excepted) the assured's own, in trust or on commission for which they are responsible, in or on all or any of the warehouses, vaults, cellars, *sheds, crane-houses, wharves, yards, [26 or quays belonging to, and if not under the protection of a marine policy on board any vessel or craft at," certain wharves in the said policies mentioned.

Among these wharves was one called Beal's Wharf, mentioned in both the policies.

On the 30th of October, 1865, and while the policies were in force, a fire occurred at Beal's Wharf, and by that fire certain chests of tea, which had been, and then were warehoused there in manner hereinafter mentioned, were either consumed or damaged. The defendants thereupon made a claim under the policies in respect of those chests of tea. The plaintiffs were not satisfied as to their liability to the whole extent of the claim so made, but paid the whole amount on the defendants entering into the abovementioned agreement to repay any sum which might be found to have been overpaid. The teas damaged or destroyed by the fire were of two classes. In respect of one class the plaintiffs admitted their liability, and did not seek to recover any portion of the sum that had been paid in respect of them.

The second class, in respect of which the repayment of the sum of 636*l.* 13*s.* 7*d.* was claimed, consisted of teas which had been warehoused at Beal's Wharf, and which had been sold by the defendants before the time of the fire, and the following were the facts relating thereto :—The teas had been originally deposited in bond with the wharfingers to whom Beal's Wharf belonged, by the importers thereof, to whom the wharfingers

issued warrants in respect thereof. The warrant is a document acknowledging that certain chests of tea therein specified are deliverable to the person named therein or his assigns by indorsement, and the bearer giving a receipt for the same. Upon a warrant indorsed by the person named therein being presented by any one to the wharfingers, and upon the person presenting it signing a receipt for all or any part of the teas contained therein, and upon payment of the duty and rent due thereon, if any, the wharfingers deliver to him the tea for which the receipt is signed. It is not the practice to deliver any of the teas mentioned in the warrant without the production of it. The wharfinger knows nothing of the actual ownership of the teas, but acts upon the production of the warrant duly indorsed. The defendants had purchased the teas from the *importers, 27] who duly indorsed the warrants in blank and delivered them to the defendants.

Before the date of the policies, under which the claim of the defendants was made, the defendants had sold to various customers the whole of the teas included in the said second class. All the sales were of certain specified chests, and were made by sample, and the contracts of sale were verbal and not reduced to writing. The terms of such sales were for three months open credit, or for cash subject to discount. The purchasers had power to pay at any time within the three months, deducting discount for the time not expired of the said credit of three months.

A further term on such sales was that all rent due to the wharfingers in respect of the teas comprised in such sales up to the time of the expiration of the said credit should be borne by the vendors, and all rent becoming due subsequent to that date, and also the custom-house duties, should be borne by the purchasers.

Shortly after each of the said sales by the defendants, and before the expiration of the period of credit, they sent to each purchaser an invoice stating, among other things, the weights, marks, and numbers of the chests bought by him, and the price payable in respect thereof. The period of credit of all the teas of the second class had expired, and the price been paid to the defendants before the fire occurred.

The ordinary course upon sales by the defendants was not to

deliver the warrants to the purchasers but to retain the said warrants in their own possession on behalf of the purchasers, and to perform for the purchasers as and when required by them whatever was necessary to get the teas cleared and delivered, that is to say, to pay the custom-house duties and rent due in respect of the goods.

This course was pursued with respect to the teas included in the second class, and at the time of the fire all the warrants for the teas then belonging to purchasers remained in manner and for the purposes aforesaid in the hands of the defendants, as the defendants had not then been required by the purchasers to clear or deliver them to or on behalf of such purchasers. The carriage of the goods was paid by the purchasers.

The wharfingers never received any notice of the sale of the teas *to the defendants by the importers, or of the sales by [28 the defendants to the purchasers from them.

There was due to the wharfingers in respect of each of the chests comprised in the said second class a sum of money as rent for warehousing the same after the purchase thereof by the defendants and before the sale thereof by the defendants to their customers, which rent was unpaid at the time of the said sales and said fire, and was a charge upon the said teas to be paid by the person claiming delivery thereof prior to delivery by the said wharfingers.

The defendants previous to the fire had made entries in their own books appropriating to each customer the specific chests of tea bought by him, and had written on each warrant the name of the purchaser of the teas therein comprised.

The defendants had no contract with the purchasers to insure the teas against loss or damage by fire, or to be repaid by the purchasers any premiums in respect of such insurance, nor had the defendants in fact charged the purchasers with any such premiums. The defendants after the fire, voluntarily and without the knowledge of the plaintiffs, paid to the purchasers the value of the teas in various sums, making together the sum of 636*l.* 13*s.* 7*d.* The question for the Court was whether the defendants were entitled under the policies to be paid by the plaintiffs the said sum of 636*l.* 13*s.* 7*d.* in respect of loss or damage caused by the said fire to the said teas included in the second class.

Nov. 9. *H. Matthews, Q.C.* (*Holl*, with him), for the plaintiffs. The teas in question were not the property of the assured. The property in them had passed to the purchasers. The defendants had not even a special property in them. The warrants were only retained by the defendants on the purchasers' behalf, in order that they might do what was necessary for the purpose of clearing the teas. The purchasers might call for the warrants at any moment, and the defendants would be bound to give them up. Neither were these goods held in trust by the defendants; they were under no responsibility in respect of them. The true construction of the policy is that the words "for which they are responsible," apply both to goods "in trust" and "on commission." The obvious intention of the 29] policy is, that the insurance should *only be on goods, the loss of which would cause damage to the assured. The defendants could suffer no damage by the loss of these teas, and, consequently, had no insurable interest in them.

[He cited *Seagrave* v. *Union Marine Insurance Co.* (1); *Waters* v. *Monarch Life and Fire Assurance Co.* (2); *London and North Western Ry. Co.* v. *Glyn* (3); *Powles* v. *Innes* (4).]

Sir J. B. Karslake, Q.C. (*Watkin Williams* and *Underdown* with him). The words "for which they are responsible," in the policy, only apply to those immediately antecedent, viz., "on commission." These goods come within the expression "in trust." The warrants, which represent the possession of the goods just as the key of a warehouse in which goods are deposited would, were still in the defendants' possession. They had duties in the ordinary course of business to perform in respect of the goods, for the purpose of enabling the purchasers to receive delivery. It is not necessary in such a case in order to have an insurable interest, that the persons interested should be responsible for the goods. Though there was no obligation to insure, the assured would be trustees of the amount recovered on the policies for the owners. See *Waters* v. *Monarch Life Assurance Co.* (2); and *London and North Western Ry. Co.* v. *Glyn* (3). These policies must be read in connection with the nature of the tea trade. It would be impossible to insure goods

(1) Law Rep., 1 C. P., 305, 320.
(2) 5 E. & B., 870; 25 L. J. (Q. B.), 102.
(3) 1 E. & E., 652; 28 L. J. (Q. B.), 188, 192.
(4) 11 M. & W., 10.

at all under the circumstances in this case, unless they are held to be covered by a policy of this description. The interests in the teas are constantly shifting. These are intended to be floating policies kept up for the benefit of the parties who may become interested in the goods insured.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Willes, Keating, and Brett, JJ.), was delivered by

KEATING, J. This was a special case, stated between the parties, for the purpose of having it decided whether the plaintiffs can recover from the defendants a sum of 636*l.* 13*s.* 7*d.*, alleged by them to have been paid to the defendants in excess of the sums due *on certain policies of insurance, and which [30 the defendants agreed, in the event of that allegation being well founded, to repay to the plaintiffs.

The policies in question were dated the 13th of October, 1865, and in consideration of an annual premium the plaintiffs insured from loss or damage by fire the property thereinafter described, "not exceeding the sum specified as applicable to the several articles, viz., 3500*l.*, Three thousand five hundred pounds, on merchandize (jute, petroleum, and its products, excepted), the assured's own, in trust, or on commission, for which they are responsible, in or on all or any of the warehouses, vaults, ships," &c., or other places specified, and certain wharves, including Beal's Wharf.

Whilst the policies were in force a fire occurred at Beal's Wharf in the policy mentioned, and consumed certain chests of tea, which form the subject of the present litigation. Those teas had been deposited in bond by the importer with the wharfinger to whom Beal's Wharf belonged, and who issued warrants for the same, deliverable to the depositor or his assigns, by indorsement thereon. The defendants had purchased the teas from the importer, who indorsed to them the warrants in blank. The defendants before the fire occurred had resold the teas in specified chests to customers, and had been paid for the same; they held, however, the warrants on behalf of such customers, but merely for the convenience of paying, if required to do so, the charges necessary to clear the teas, such as custom-house dues and rent, payable by the vendees. Under these

circumstances, therefore, stated in the present case, we are of opinion, that before and at the time of the fire, the property in the teas had passed to the vendees, and that the teas remained at their risk, and not at the risk of the defendants, who had no longer any interest in them, or responsibility to the vendees in respect of them in case of fire.

But it was contended on behalf of the defendants that even supposing that to be the case, still the policy, being a floating policy, covered the goods in question as goods in trust, and that, therefore, the defendants were liable to pay their full value, and the cases of *Waters* v. *Monarch Insurance Co.* (1), and *London and* 31] **North Western Ry. Co.* v. *Glyn* (2) were relied on in support of that contention. In those cases, goods held by the plaintiffs as bailees were insured by them under policies the conditions of which provided that goods held in trust would not be covered by the policies unless they were insured as such. The goods accordingly were insured expressly as goods held in trust by the assured. The offices contended, that as the plaintiffs, as bailees, had no insurable interest in the goods beyond their liens respectively, they could only recover to the amount of such liens. But the Court held in each case that the plaintiffs were entitled to recover to the full amount insured, and intimated that the excess beyond the personal interest of the assured would probably be held in trust for the parties really interested, though unaware of the insurance having been effected. If, therefore, the words in the present policy had been similar to those in the policies referred to, we should have thought the cases were authorities in favor of the defendants' view, notwithstanding that they had no interest even amounting to a lien upon the goods in question; but it will be observed the wording in the present policy is essentially different, for whilst in the cases referred to the insurance extended to "goods in trust or on commission" generally, in the present case it is expressly limited to "goods in trust or on commission, for which they (the assured), are responsible." In *London and North Western Ry. Co.* v. *Glyn* (2), Erle and Hill, JJ., had thrown out that if insurance companies wished in future to limit their responsibility to the responsibility of the assured, they must employ express words to that effect. It seems to us that the

(1) 5 E. & B., 870: 25 L. J. (Q. B.), 102. (2) 1 E. & E., 652; 25 L. J. (Q. B.), 188.

present plaintiffs have done so in this policy, and have expressly limited their liability to such goods as were held in trust by the assured, and for which they were responsible. It follows that the goods in question for which the assured were not responsible were not covered by the policy, and consequently that the plaintiffs are entitled to the judgment of the Court.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Clements.*
Attorneys for defendants: *Willoughby & Cox.*

Nov. 3, 1871

*Pappa v. Rose. [32

*Law Reports, 7 Common Pleas, 32.

Arbitration — Broker made Referee to determine whether or not Goods are of the Quality contracted for.

The defendant, as broker, made a contract for the plaintiff, as follows:— "Oct. 26, 1869. Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. H. & Son, to arrive, 500 tons Black Smyrna raisins — 1869 growth — fair average quality in opinion of selling broker— to be delivered hre in London— at 22*s.* per cwt. D. pd. Shipment, November or December, 1869," &c.:—

Held, that the defendant was in the nature of an arbitrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for not having exercised reasonable care and skill in coming to a decision,—it being conceded that he had acted bona fide and to the best of his judgment.

Quære, whether the contract was satisfied by the tender of raisins of "fair average quality" generally, or whether it required that they should be of fair average quality of the growth of 1869?

The first count of the declaration stated that the plaintiff retained and employed the defendant, as selling broker, for reward payable by the plaintiff to the defendant in that behalf, to sell certain goods for the plaintiff, to wit, raisins, upon the terms of a certain sale-note in the words and figures following, that is to say, "29 Mincing Lane, London, 26 October, 1869. Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. Hanson & Son, to arrive, 500 tons Black Smyrna

raisins — 1869 growth — fair average quality in opinion of selling broker — to be delivered here in London — at 22*s.* per cwt. D. pd. Shipment, November or December, 1869. If not delivered buyer to be allowed 1*s.* per cwt. In bags. Bags included in weight. Customary allowances. Discount 1 per cent. Prompt two months from date of final landing:" and in consideration thereof the defendant promised the plaintiff that he the defendant would use due care, skill, and diligence in and about the said sale by the defendant, and in acting as the selling broker within the meaning of the contract, and in and about sampling and examining the goods in order to form a just and correct opinion of the same, within the meaning of the contract, and in declaring the same as between the plaintiff and the buyer: That the defendant accepted the retainer and *entered 33] upon the employment; and that all conditions precedent were fulfilled, &c., to entitle the plaintiff to have the defendant exercise due care, skill, and diligence in sampling and examining the goods in order to form a just and correct opinion of the same, and in declaring the same as between the plaintiff and the buyer, and to sue the defendant for the breach thereinafter complained of: Yet the defendant so unskillfully and negligently conducted himself in and about the sampling and examining the goods, and in forming and declaring his opinion thereon, that, although the goods were Black Smyrna raisins of 1869 growth, fair average quality, yet the defendant declared his opinion that the same were not of fair average quality within the meaning of the contract; by reason whereof the buyers of the goods refuse to accept delivery of them, and the plaintiff was unable to enforce the contract of sale against the buyers.

Second count, that the plaintiff retained and employed the defendant as selling broker to sell certain goods for the plaintiff as and upon the terms in the first count mentioned; that the defendant accepted the retainer and entered upon the employment, and, in consideration thereof, promised the plaintiff that he would carefully examine the goods, and would exercise his judgment justly and fairly in order to form and declare his opinion thereon, as selling broker, within the meaning of the contract: Averment of performance of all conditions precedent, &c.: Breach, that the defendant did not carefully examine the goods, nor exercise his judgment justly and fairly thereon, and,

although the goods were Black Smyrna raisins, 1869 growth, of fair average quality, the defendant declared that in his opinion they were not fair average quality; whereby the plaintiff suffered damage as in the first count mentioned.

Pleas,—1. That the plaintiff did not retain and employ the defendant as selling broker, and he did not promise as alleged. 2. A denial of the breaches.

Issue thereon.

The cause was tried before Bovill, C.J., at the sittings in London after Hilary Term last. The making of the contract set out in the declaration, by the defendant, as selling broker, was proved. It was also proved that, on the 17th of December, 1869, certain *Black Smyrna raisins ex *Persian*,— the first [34 shipment of the season,— having been offered in part fulfilment of the contract, the defendant, after examining the bulk, gave the following certificate:—"I have carefully inspected the bags Black raisins ex *Persian*, lying at Red Lion and Three Cranes Wharf, marked S. N. I am sorry to find I must reject them, as they are not fair average quality of 1869 growth;" and that, on the 10th of February, 1870, certain other raisins ex *Propontis* and *Arabian* having been tendered by letter of the plaintiff dated the 9th, the defendant certified as follows:—"I am sorry to say I must decline to pass the Black raisins therein offered in fulfilment of my contract dated 26th October last, they not being fair average quality of 1869 growth."

Several witnesses (fruit-brokers) were called, who proved that the raisins offered in fulfilment of the contract were not of "fair average quality," and therefore were properly rejected. But it was contended on the part of the plaintiff that the article contracted for was fruit of "fair average quality, of the growth of 1869;" and there was evidence to show that the growth of Black Smyrna raisins of 1869 was exceptionally bad, and that the raisins tendered were fair average of that particular year's growth.

There was no evidence to show that there was any recognized standard by which to estimate the fair average quality of Black Smyrna raisins generally, or the average of any given number of years,— they being an article of very limited demand in the London market, and no samples of the different years' growths being kept.

For the defendant, it was submitted, that the true meaning of the contract was, that the fruit should be of "fair average quality" generally, and that the defendant, having acted in the matter as an arbitrator or quasi arbitrator, was not responsible, provided he had acted bonâ fide.

On the part of the plaintiff it was insisted that the contract was satisfied by the tender of Black Smyrna raisins of fair average quality of the growth of 1869; and that the defendant, as selling broker, not having brought due and reasonable care and skill to the examination of the raisins tendered, was liable in damages for having improperly rejected them.

35] *The Chief Justice ruled that the "fair average quality" in the contract meant fair average quality generally, and not of the year 1869; and that an action would not lie against the defendant, inasmuch as he acted as a judge or arbitrator in deciding on the quality of the raisins,—provided he acted bona fide: and he thereupon nonsuited the plaintiff.

It was agreed that a new trial should be granted only if the Court should be of opinion that his Lordship's ruling was wrong upon both points; and that the unsuccessful party should have leave to appeal.

Sir J. B. Karslake, Q.C., in Hilary Term last, obtained a rule nisi.

Giffard, Q.C., *Murphy*, and *Howard Smith*, showed cause. The construction put upon the contract by the Chief Justice, at the trial, was clearly correct, whether it be taken grammatically or with reference to the surrounding circumstances. The plain meaning of the parties was that the raisins should be of fair average quality. It is true that they are to be of the growth of 1869; but that stipulation does not alter the substance of the contract, which is for "Black Smyrna raisins of fair average quality." The shipments were to be of November and December, 1869. The average of that year's arrivals could not then be known, inasmuch as the average must be ascertained by a comparison of all the shipments of the season. Then, the action is one which cannot be maintained. The defendant, in determining on the quality of the raisins, was not acting in the capacity of broker. He was an arbitrator employed to decide between the parties whether or not the quality of the fruit was.

such as to satisfy the terms of the contract. It is enough to say that, in the absence of mala fides, no action will lie against a person so appointed. *Jenkins* v. *Betham* (1), which was cited at the trial, was a totally different case. The defendant there was employed, not as a referee, but as a valuer, to value certain dilapidations on the part of the plaintiff. He was bound to bring to the work he undertook to do a competent degree of skill and knowledge. In this he failed; and therefore he was properly held liable. Here, however, a certain matter of controversy was referred for the *decision of the defendant, [36 and that decision was to be final between the parties. He was, in truth, exercising the functions of a judge.

Sir J. B. Karslake, Q.C., Sir G. Honyman, Q.C., and *Watkin Williams*, in support of the rule. These mercantile contracts are not to be construed according to the strict rules of grammar. Reading this contract as any mercantile man would read it, it is free from ambiguity. The raisins are to be of the growth of 1869, and of fair average quality; that is, they are to be of the fair average quality of the growth of 1869. All the witnesses were agreed that the raisins tendered answered that description. It is not necessary to wait until all the shipments of the season have arrived, in order to ascertain what is the fair average quality of the growth of the particular year. The condition and prospects of every crop,—whether of grain, of cotton, or of fruit,—is well known long before the shipments can arrive in this country. There is not, and cannot from the nature of the thing be, any such thing known in this trade as "fair average quality" generally, as in the case of grain, wool, cotton, bacon, or the like, as to which there is a known standard in the particular trade. The certificates given by the defendant show that he himself understood the contract to mean "fair average of the growth of 1869." He was employed by the plaintiff to draw the contract, to take samples of the raisins, and to examine them and form a judgment as to whether or not they answered the description in the contract. He was bound to bring a reasonable degree of skill and knowledge to the performance of these three things. For a failure through negligence or unskilfulness in the performance of two of these duties, he would unquestionably be liable: *Harmer* v. *Corne-*

(1) 15 C. B. 168; 24 L. J. (C. P.), 94.

lius (1); Chitty on Contracts, 7th ed. 505. Why should he not be liable for failure as to the third? It was one of the things which he as selling broker by the terms of the contract bound himself to do. He could not refuse to perform either of them.

[BRETT, J. Would the chairman of the Cotton Brokers' Association of Liverpool, to whom a matter in difference is referred under the ordinary cotton contracts, there, be liable to an action for a mere failure to exercise a correct judgment upon it?]

That is clearly a case of arbitration. But "it is not in every 37] *case where two parties intend to be concluded by the decision of a third that that third person is an arbitrator:" Russell on Arbitration, 3d ed. 42, 4th ed. 38.

KEATING, J. This is an action by the plaintiff against the defendant, a broker in London, for unskilfulness in the discharge of his duty as such broker, whereby the plaintiff has sustained damage. On the 26th of October, 1869, Rose, the defendant, as selling broker, made a contract between the plaintiff and Messrs. Hanson & Son in the following terms:—"Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. Hanson & Son, to arrive, 500 tons Black Smyrna raisins — 1869 growth — fair average quality in opinion of selling broker — to be delivered here in London — at 22*s.* per cwt. D. pd. Shipment November or December, 1869. Prompt two months from date of final landing." At the trial before the Chief Justice, the plaintiff gave evidence to show that the defendant, who had refused to pass certain raisins tendered in fulfilment of the contract, as not being "fair average quality of 1869 growth," had not exercised reasonable and proper skill in arriving at that conclusion: and several fruit-brokers were called to show that the raisins tendered were not of fair average quality, and ought not to have been passed. The Chief Justice nonsuited the plaintiff, on two grounds. In the first place, he was of opinion that the words "fair average quality" in the contract meant "fair average quality generally," and not "fair average quality of the growth of 1869." If that be the true construction of the contract, the plaintiff failed to support his declaration. But, further, my Lord was of opinion, that, according to the

(1) 5 C. B. (N. S.), 236; 28 L. J. (C. P.), 85.

terms of the contract and the evidence given in the cause, the defendant was in the position of an arbitrator,—not of an arbitrator in the ordinary acceptation of the term, but of a quasi arbitrator; that he was by agreement of the parties to finally decide a matter in dispute between them: and upon that ground also the nonsuit proceeded. The question for our consideration is, whether my Lord was right in nonsuiting the plaintiff.

With reference to the first point, I must confess I entertain considerable doubt; and, if it had been necessary to decide that question, I should have desired time to consider. But, under *the terms of the reservation, it seems to me that it [38 is not necessary to decide this point, because I am clearly of opinion that the nonsuit was right upon the second point, and that the defendant was in the position of a quasi arbitrator, and so was protected against an action for an error in judgment. The substance of the argument on the part of the plaintiff upon this was, that the defendant's undertaking was an undertaking in his capacity of broker to bring to the performance of his duty a reasonable degree of care and skill, and that, inasmuch as the examination of the raisins was a part of the duty which he had taken upon himself, he was liable to an action for having performed that duty in a negligent and unskilful manner; and that the question whether or not the defendant had exercised due and reasonable skill ought to have been submitted to the jury. I think this was not a matter to be done by the defendant in his ordinary capacity as a broker. It is true that he was a broker, and that he made the contract. But he was only to decide upon the quality of the raisins, in the event of a dispute arising between the parties. It might have been that the buyer was satisfied with the fruit tendered, and in that case the functions of arbitrator would not have come into operation at all. If, on the other hand, the fruit tendered was rejected as not complying with the contract, the opinion of the referee either way would be a binding decision on the matter; and for any mistake which he might make he clearly would not be liable. The case of *Jenkins* v. *Betham* (1) is obviously distinguishable. There, two persons were employed to value, as between an incoming rector and the representatives of the deceased rector, the dilapidations of the rectory house and premises, an umpire

(1) 15 C. B., 168; 24 L. J. (C. P.), 94.

to be named by them in case they should disagree. The defendant, the valuer appointed on behalf of the plaintiff, the incoming rector, through ignorance of the true principle for the valuation of ecclesiastical dilapidations, valued so favorably to the other party that his valuation was accepted, and consequently the matter never went to the umpire. As Mr. Justice Williams observed in the course of the argument (1), "the substance of the thing is, that there is no submission until the matter goes to the umpire." In no sense can that case be an 39] authority on the *present occasion. Upon the second point, therefore, I am of opinion that my Lord was right in nonsuiting the plaintiff.

BRETT, J. The plaintiff was nonsuited upon two grounds. It was agreed at the trial that he was properly nonsuited, if the ruling of the Chief Justice was right on either ground. It seems to me that the same result must have followed if no such agreement had been come to at all. The first ground of nonsuit was upon the construction of the contract. It was conceded that, if the construction put upon it by my Lord was right, viz., that the subject of the contract was fruit of "fair average quality generally," the plaintiff was properly nonsuited. On the other hand, it was conceded by the defendant, that, if that construction was wrong, and the contract was for fruit of the growth of 1869, the nonsuit ought to be set aside. I must confess that, taking the contract and the evidence as it stood, I entertain considerable doubt. My impression is that there were no sufficient materials before the Court at the trial to enable either my Lord or the jury to say what was the true mercantile meaning of the contract. If it had been shown that there was in the trade a known and recognized average quality of Black Smyrna raisins, the construction which my Lord put upon the contract at the trial would undoubtedly have been correct; but I incline to think that, if there was no such recognized and acknowledged general average quality, the proper construction of the contract would be that it meant "fair average quality of 1869 growth." There was, however, no evidence one way or the other. But I think it is quite unnecessary for us to determine what is the true construction of the contract, because I

(1) 15 C. B., at p. 181.

think the Lord Chief Justice was clearly right upon the second point. The ruling upon that was, not that the defendant was in the strict sense of the term an arbitrator, but that he was a person filling a position which brought him within an exception well known to the law of England, viz., that a person who is appointed and is acting as an arbitrator to determine a matter in difference between two or more persons does not enter into an implied promise to bring to the performance of the duty intrusted to him a due and reasonable amount of skill and knowledge. The question is merely one of *implied [40 undetraking; and the law says there is none such. Was, then, the defendant within that exception? I apprehend that every person falls within it who has taken upon himself to determine a disputed matter between two persons who have agreed to be concluded by his opinion. The parties had so agreed here: and that opinion could not be called for until the fact was in dispute. The defendant, therefore, was a person who was appointed conclusively to determine a disputed fact. One requisite of an arbitration is thus given in Russell on Arbitration, 4th ed. 38:—"The parties must manifestly intend to be concluded by the decision of the person called in, in order to clothe him with the authority of an arbitrator." It is said that the present defendant is not a person in that position, because he was something else besides an arbitrator; he was the broker who negotiated the contract between the parties. I cannot see why his freedom from liability as arbitrator should be taken away from him because he had undertaken another duty, as broker to make the contract. In the latter capacity, I agree that he would be bound to exercise ordinary care and skill; but, when he became the person who was to determine the dispute as to the quality of the raisins, he was clearly brought within the exception. *Jenkins* v. *Betham* (1) was relied on for the plaintiff. That case, however, only goes to show that the defendant might have been liable for want of due care and skill as broker in making the contract. Williams, J., there points out that the duty of the umpire must be called into action before there was any submission at all. It was of the defendant's conduct as valuer that the plaintiff complained. Just as here, if the defendant had shown a want of due and reasonable care and

(1) 15 C. B., 168; 24 L. J. (C.P.), 94.

skill in making the contract, he might have been liable for that; but not to the present action. The following was cited from Russell on Arbitration, 3d ed. 42 (4th ed. 38), for the purpose of showing that this defendant was not an arbitrator,—"It is not in every case where two parties intend to be concluded by the decision of a third party that the third person is an arbitrator." That may or may not be true; and I will not stop to inquire whether the authorities cited bear out the position. It is not necessary to decide it. Upon the whole, I am satisfied 41] that the *ruling of the Chief Justice upon the second point was right, and that this rule must be discharged.

Bovill, C.J. Neither party required any question to be left to the jury. It was treated by both as a question of construction upon the terms of the contract itself. I consulted my Brother Willes upon both points; and, acting upon his advice, I stopped the case.

As to the first point, it is to be observed that the subject of the contract is "Black Smyrna raisins:" then follow stipulations as to what the raisins were to be, their mode of packing, &c., each being separated by a dash, the effect of which is to make each stipulation a separate sentence,—or as if each had been written in a separate line. In the first place, they are to be "1869 growth:" next, they are to be "fair average quality in opinion of selling broker." What is the meaning of that? The plaintiff contends that they were to be of fair average quality and also of the growth of 1869. Those are not the words of the contract. Are they the meaning? Do the two expressions mean the same thing? The whole case proceeded upon the assumption that the two are different. The plaintiff's case was, that the whole of the shipments of 1869 were of inferior quality to those of former years; and that, in truth, "fair average quality generally" was different from "fair average of 1869 growth." Several witnesses stated that the raisins tendered in fulfilment of the contract were not of fair average quality generally. That being so, and the words used being "fair average quality," it seemed to me that they ought not to be read as if the words "of 1869 growth" had been inserted after the words "fair average quality." There would, it was urged, be a difficulty in ascertaining the fair average

quality of the growth of 1869 at the date of the contract; and that the buyer ought to be able to ascertain the quality of the fruit at the time of the contract, or at all events at the time of the delivery or tender. But, if the parties had intended to stipulate that the quality should be of the average of the particular year's growth, they might easily have done so, as is usual in corn contracts. I retain the opinion I expressed at the trial. I think the words "fair average quality" apply to "Black Smyrna raisins," the *subject of the contract, and [42 not to "1869 growth," which is in a separate sentence.

Upon the other question, viz. whether an action can be maintained against the broker, who is admitted to have acted bonâ fide, I see no reason to dissent from the conclusion arrived at by my learned Brothers. The selling broker was the person selected by both buyer and seller to determine whether or not the raisins tendered were of fair average quality. It by no means follows that, when two persons submit a matter in difference to the arbitrament of a third, they agree to take a person of the greatest amount of skill or intelligence. No matter what may be the degree of skill he possesses, the decision of the person selected is final and conclusive; and he is not liable to an action if he makes a mistake. Here, it is want of skill only that is suggested. The defendant was in the nature of an arbitrator chosen by the parties, whose decision is final. Upon general principles, no action lies against him. There is no implied contract on his part, except that he will act honestly and bonâ fide.

Rule discharged.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorneys for defendant: *Stibbard & Beck.*

Where the parties agree that a third person shall determine whether goods to be delivered comply with the terms of a contract the decision of such third person on the question is final and conclusive. *Clinton* v. *Brown*, 41 Barb., 226; *Delafield* v. *James*, 27 How., 357, 18 Abb. Prac., 221; see also *Prentiss* v. *Farnham*, 22 Barb., 519.

Nov. 11, 1871.

43] *The Phosphate of Lime Company, Limited v. Green and another.

Law Reports, 7 Common Pleas, 43.

Public Company — Power and Authority of Directors — Ratification by Shareholders of an Act ultrà Vires of the Directors.

A company was established for the working of two mines, with a nominal capital of 300,000*l.*, divided into 12,000 shares of 25*l.* each. Difficulties arising as to the title to one of the mines, and the defendants, who had negotiated the purchases for the company, and were to receive 10,000*l.* from the vendor of each mine, and had received the 10,000*l.* upon the completion of the purchase of the other mine, having bought 400 shares in the market and not being prepared to take them up, applied to the company for assistance, and the latter advanced them 6500*l.* upon the defendants undertaking to return it in the event of the purchase of the second mine not being completed within three months. The shares were taken up, but the contract for the purchase of the mine ultimately went off. The directors then called upon the defendants to return the 6500*l.*, and, after much negotiation, it was arranged that the defendants should transfer to the company the 400 shares (10*l.* paid up), in satisfaction and discharge of the claim of the company against them. This transaction took place in August, 1866; and in March, 1867, at a meeting of the shareholders it was agreed that the company should go into liquidation, and its business be transferred to a new company with a diminished capital and 10*l.* shares, the directors of the new company being the directors of the old one, and the shareholders in the old company being holders of share for share in the new one. A report of the directors was read, showing the reasons for the liquidation and transfer, and that the diminution of the capital was owing partly to the abandonment of the purchase of the second mine and partly to "shares forfeited for non-payment of calls." At this meeting an account was handed to each shareholder present, in which the sum of 4000*l.* was set down as the price of "shares cancelled;" and the account of the defendants in the company's ledger was credited with 4000*l.*, "as per shares forfeited account."

By the articles of association of the company the directors were prohibited from purchasing their own shares; but they had power to compromise debts due to them, and to forfeit shares for non-payment of calls: —

Held, that, assuming that the compromise with the defendants by the acceptance and cancellation of the 400 shares was ultrà vires of the directors, the subsequent conduct of the shareholders in assenting to the transfer of the old to the new company, with knowledge or the opportunity and means of knowing, if they thought proper to inquire, that such transfer was in part founded upon such cancellation, was a ratification and acquiescence in what the directors had done, and sustained a plea of accord and satisfaction to an action brought in 1870 against the defendants in the name of the old company for the recovery of the 6500*l.* advance.

To show assent and acquiescence in such a case, it is not necessary (or possible) to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the Court or a jury that

the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

*By one of the articles of association of a joint-stock company, it was pro- [44
vided that "the company shall not, under any circumstances, purchase its own shares." The directors, having advanced money to the promoters of the company, to enable them to take up shares which they (the promoters) had bought, but for which they were unable to pay, agreed, by resolution, to abandon their claim to have the money returned, in consideration of 400 shares (upon which 10*l.* per share had been paid up) being given up to them to be cancelled:—

Semble, that this was a "purchase of shares" within the prohibition above mentioned.

THE first count of the declaration was for money lent by the plaintiffs to the defendants; the second for a wrongful conversion by the defendants of goods of the plaintiffs, to wit, twenty-five debenture bonds of the Phosphate of Lime Company.

Pleas, to the first count, never indebted, payment, and that the defendants satisfied and discharged the plaintiffs' claim by delivering to the plaintiffs certain shares in the company, then being of great value, to wit, 6000*l.*, and all their right and title therein, and the certificates thereof, and a certain paper purporting to be a transfer of the said shares, and by the plaintiffs accepting the same in full satisfaction and discharge of the plaintiffs' claim; and to the second count, not guilty, and that the defendants satisfied and discharged the plaintiffs' claim by delivering to the plaintiffs certain shares, and the certificates thereof, and a paper purporting to be a transfer of the shares, and by the acceptance by the plaintiffs of the same in full satisfaction and discharge of the causes of action in the last count stated Issue thereon.

The cause was tried before Brett, J., at the sittings at Guildhall after last Trinity Term. The facts proved were as follows:—The Phosphate of Lime Company, Limited, was established in July, 1865, under the Joint Stock Companies Act, 1862 (25 & 26 Vict. c. 89), for the purpose of purchasing or leasing and working certain mines or quarries of phosphate of lime in the island of Sombrero, in the West Indies, and elsewhere. Its capital was to be 300,000*l.*, divided into 12,000 shares of 25*l.* each. The articles of association of the company contained, amongst others, the following provisions:—

Art. 19. "The company may forthwith issue the 12,000 shares of 25*l.* each, into which its nominal capital of 300,000*l.* is divided, and may from time to time, with the sanction of a special resolution, increase the capital beyond the sum of

300,000*l.*, by the creation of new shares; provided that such new shares shall in
45] *the first instance, unless the company on the creation thereof shall otherwise determine, be offered to all the members of the company for the time being, in proportion to the number of their respective shares, and such of them as are not taken by the members may be disposed of to such other persons as the board shall determine. The company shall not, under any circumstances, purchase its own shares."

Art. 84, sub.-s. 4. "They (the directors) may, at their discretion, make, enter into, rescind, alter, vary, renew, or otherwise deal with any contracts or engagements by or on behalf of the company, or the terms and conditions thereof, or the time or manner at or in which any payments or securities or obligations in respect of any such contract or engagement may be payable, and make such payments, securities, or obligations payable at other times or in another manner than may have been originally agreed upon, or grant or enter into a new or other contract or engagement in lieu thereof or in exchange therefor."

Sub.-s. 11. "They may let, mortgage, sell, or otherwise dispose of, either absolutely or conditionally, in such manner and upon such terms in all respects as they may think fit, any of the property of the company, and may accept payment or satisfaction for any property so disposed of or dealt with, in such manner as they may deem expedient."

Sub.-s. 18. "Generally where these articles are silent or do not otherwise provide, the directors, in their discretion, shall have full power to do and execute all such acts, deeds, and things necessary or deemed by them proper or expedient for carrying on the business of the company, and to enforce, perform, and execute all acts and things in relation to the company, and also to make rules and regulations for carrying on the business and concerns of the company, and to alter and vary the same as they shall think fit; and all such rules and regulations shall be binding on the company, provided the same be not repugnant to law or to any of the provisions of these articles."

Art. 113. "The directors may decline to register any transfer of shares made by a member who is indebted to the company, and shall have a paramount lien upon all the shares of any member for the amount of any debt due from him to the company either solely or jointly with any other person; and, if such debt be not paid within three months from the service of a notice on such member requiring him to pay such debt together with interest and any expense that may have accrued by reason of such non-payment, the shares of such member, or so many of such shares as shall be sufficient to pay such debt, shall be liable to be forfeited, and, by a resolution of the directors to that effect, may be forfeited accordingly; and the company may thereupon sell and transfer all or any of the shares so forfeited, and apply the proceeds of such sale in or towards payment of the debt so due from such member as aforesaid; and the consent of such member shall not be necessary for giving validity to any sale, disposition, or transfer of any such shares."

Articles 121 to 127 contained provisions for forfeiture of shares for non-payment of calls, &c.

The defendants, Green and Nicholls, were the promoters of the company, and on their behalf negotiated with one Wood for the purchase of a mine in the island of Sombrero, and also
46] with one *Dumas for the purchase of a mine at Lagrosan, in

Spain. Upon each of these transactions, Green and Nicholls were to receive from the vendor a sum of 10,000*l.*, 7500*l.* in cash, and 2500*l.* in debenture bonds. The Sombrero purchase was duly completed, and Green and Nicholls received the 10,000*l.* thereon, as agreed. Some difficulty, however, arose as to the vendor's title to the Lagrosan mine; and, although the directors had on the 27th of February, 1866, issued a prospectus, in which they stated that they had "succeeded in obtaining" both mines, the purchase of the last mentioned mine had not been completed at the time the transaction next mentioned took place.

Green and Nicholls, for the obvious purpose of furthering the interests of the company, had bought a large number of shares in the market; and, being unprepared to take them up on the settling day, they applied to the directors for assistance, and the directors, knowing the injurious consequences which would result to the company from these shares being again thrown upon the market, with the consent and at the request of Dumas agreed to advance to Green and Nicholls 6500*l.* in cash and fourteen debenture bonds for 100*l.* each; and a resolution to that effect was passed at a meeting of the 9th of March, 1866. Upon receiving the advance, Green and Nicholls signed the following receipt:—

"London, March 9, 1866.

"Received on our joint and several account from the Phosphate of Lime Company (Limited) the sum of 7500*l.*, and twenty-five debenture bonds of 100*l.* each of the company; the said cash and bonds being taken and accepted by us as an advance from the company pending the completion of M. Dumas's purchase, and to be accounted for by us jointly and severally and repaid to the company to the extent of 6500*l.* and fourteen of the said bonds of 100*l.* each, in the event of the said purchase from any cause not being completed within three months from the date hereof.

"Thomas Green.
"Edward C. Nicholls."

Green and Nicholls in fact received only 6500*l.* in money and fourteen bonds; 1000*l.* and eleven bonds being retained by the company by arrangement. The shares (400 in number) were accordingly taken up by Green and Nicholls.

The purchase of the Lagrosan mine eventually going off, the directors called upon Green and Nicholls to repay them the above advance; and, after some negotiation, by a resolution of the directors *of the 10th of July, 1866, confirmed by a sub- [47
sequent resolution of the 24th, it was arranged "that 400 shares

(10*l.* paid-up) of the company should be delivered up by Green and Nicholls to be cancelled, in satisfaction of the debt due by those gentlemen to the company," with a promise on the part of the directors, that, if any dividends should be declared as to 300 of the shares within three months, Green and Nicolls should have the benefit thereof. The 400 shares were accordingly delivered up by Green and Nicholls to the directors, and cancelled by them; and the account of Green and Nicholls in the company's ledger was credited, under date the 21st of August, 1866, "By shares forfeited account, 4000*l.*" The names of Green and Nicholls appeared in the list of "forfeited shares" for a like sum.

In consequence of the failure to obtain the Lagrosan mine, it was proposed at the end of the year 1866 that the Phosphate of Lime Company should go into liquidation, and should transfer to a new company, to be called the Sombrero Company, all its business and assets, that the capital should be reduced to 132,000*l.*, and the shares instead of 25*l.* each should be reduced to 10*l.* each, the shareholders in the Phosphate of Lime Company to be shareholders, share for share, in the new company. Accordingly, on the 6th of March, 1867, a meeting of the shareholders of the Phosphate of Lime Company was held, at which a report of the directors was read, stating the reasons for the liquidation of the original company and the prospects of the new company, and informing the shareholders that the proposed reduction of the capital had been effected partly by shares cancelled owing to the abandonment of the Lagrosan purchase, partly by "shares forfeited for non-payment of calls," and partly by the abatement by the vendor of the Sombrero mine in the number of paid-up shares issued to him. At this meeting the report was read, the books of the company were produced, and an account was circulated amongst the shareholders in which the sum of 4000*l.* appeared as representing forfeited shares.

The transfer having taken place, the Sombrero Company (the directors of which were the directors of the Phosphate of Lime Company) continued to carry on business, paying several dividends, down to the end of 1869, when it also went into liquidation.

48] *On the 7th of February, 1870, the liquidator of the Phosphate of Lime Company made a demand upon Green and

Nicholls for the 6500*l.* and the fourteen bonds referred to in the receipt of March 9th, 1866; and, upon their refusal to comply with such demand, the present action was brought by leave of the Court of Chancery.

For the plaintiffs, it was submitted that the directors had no authority under the articles of association to make the alleged compromise of July, 1866. For the defendants, it was insisted that the directors had authority to make the compromise; and that, assuming they had not, the circumstances attending the transfer of the business of the original company to the Sombrero Company showed such ratification or acquiescence on the part of the shareholders as to make the act lawful, and consequently that the plea of accord and satisfaction was proved. The plaintiffs' counsel declined to go to the jury; and a verdict was thereupon taken, by the direction of the learned judge, for the defendants upon that plea.

Hawkins, Q.C., in Easter Term last, obtained a rule nisi to enter a verdict for the plaintiffs for 6500*l.*

Nov. 8, 10. *H. Giffard, Q.C., W. G. Harrison*, and *Benjamin*, showed cause. The receipt by the directors of the 400 paid-up shares in settlement of their claim against Green and Nicholls was a good accord and satisfaction, and clearly within the authority conferred upon them by the articles of association. And, if there was any excess, the subsequent ratification and adoption by the company of the compromise, and the cancellation of the shares, made the act lawful. The situation of the defendants was thereby altered to their prejudice; and that of the company improved to the extent of the increased dividends which would result to them from the cancellation. The transaction was not a "purchase of shares," within article 19, but a compromise or settlement of a claim within article 84, sub-sections 4 and 18, and article 113, which obviously contemplate a case where the company may take back their own shares in satisfaction of a debt due to them. A resumption of capital under such circumstances cannot be called a purchase. The prohibition only applies to the buying of shares *in the market, or, in other [49 words, to what is called "rigging the market." At all events, there was abundant evidence of ratification, with full knowledge of all the circumstances. The shareholders had reasonable

notice by the report and accounts presented to them at the meeting in March, 1867, when the whole property and effects and rights and obligations of the old company were by consent of the proprietors transferred to the new one. The shares in the new company would necessarily be increased in value by the cancellation of the defendant's shares; and its members have gone on receiving dividends on the footing of such cancellation being authorized down to the time of the commencement of the present action. When all the facts are looked at, it is impossible to say that the company had not ample opportunity of knowing what had been done. There are numerous authorities to show that where an act has been done by a public company which is ultrà vires, or to the legality of which certain formalities are requisite, and the circumstances are such that knowledge and acquiescence may be imputed to every shareholder, the Court will, as against the company, infer that the necessary formalities have been complied with: *Bargate* v. *Shortridge* (1); *Re Magdalena Steam-Navigation Co.* (2); *Re British Provident Life and Fire Assurance Society* (*Grady's Case*) (3); *Reuter* v. *Electric Telegraph Co.* (4); *Evans* v. *Smallcombe* (5); and the judgment of Blackburn, J., in *Taylor* v. *Chichester and Midhurst Ry. Co.* (6); and see Chitty on Contracts, 7th ed. 255. The decision of the House of Lords in *Spackman* v. *Evans* (7) in no way conflicts with the present argument. The act of the directors here was not an absolute nullity, but, at the most, was what the civilians call a relative nullity; and the company can only take advantage of it by rescinding it, and returning what they had received under it: see the judgment of Mellish, L.J., in *Ayers* v. *South Australian Banking Co.* (8).

Nov. 11. *Hawkins*, *Q.C.*, *Sir G. Honyman*, *Q.C.*, and *Lanyon*, in support of the rule. The 6500*l.* was a debt justly due to the company. The directors were under no obligation to
50] advance the *money to Green and Nicholls: their remuneration was to come from the vendor of the mine. Although it might have been competent to the directors to

(1) 5 H. L. C., 297; 24 L. J. (Ch.), 457.
(2) Johns., 690; 29 L. J. (Ch.), 667.
(3) 1 D. J. & S., 488; 32 L. J. (Ch.), 326.
(4) 6 E. & B., 341; 26 L. J. (Q. B.), 46.
(5) Law Rep., 3 H. L., 249.
(6) Law Rep., 2 Ex., 356, 375.
(7) Law Rep., 3 H. L., 171.
(8) Law Rep., 3 P. C., 548.

compromise their claim in some shape, they clearly could not do so by a purchase of shares, for that is distinctly prohibited by the 19th clause of the articles of association; and they could not legally do it by a cancellation of shares, for that would be diminishing the capital of the company, which is distinctly prohibited by s. 12 of the Companies Act, 1862 (25 & 26 Vict. c. 89), which was in force at the time. No doubt, shares may be *forfeited* for non-payment of calls, but that is not this case; it is the case of an acquiring by the company of its own shares by agreement for a money payment, or, what is the same thing, the forbearance of a debt, and therefore within art. 19, which provides that "the company shall not, *under any circumstances*, purchase its own shares." Then, as to the supposed ratification. What are the facts relied on by which the shareholders are to be fixed with notice or knowledge of the act of the directors in compromising their claim by the cancellation of these shares? They are simply the report of the directors at the meeting for the transfer of the Phosphate of Lime Company to the Sombrero Company, in which it appeared that the reduction of the capital of the new company was in part due to "shares forfeited for non-payment of calls," together with the statement in the accounts then presented to the shareholders that Green and Nicholls had been credited with the 4000*l.* for the cancelled shares. That clearly was no notice to the shareholders of *this* transaction.

[WILLES, J. It was calculated to put them upon inquiry, and that would have led to knowledge.]

It was not calculated to lead the shareholders to the knowledge that these shares had been bought by the directors, but rather to induce them to believe that they had been forfeited in invitum. Besides, the report and account were not sent to the shareholders; nor was there evidence that a single shareholder saw the entry in the ledger.

BRETT, J. The report was read at the meeting in March, 1867, and a copy of the account was given to all the shareholders present; and a sufficient number of shareholders attended to *authorize the transfer of the business of the Phosphate of [51 Lime Company to the Sombrero Company. The report showed that the shares in question were cancelled, and the account showed what that cancellation meant.]

The facts to show acquiescence here were not nearly so strong as those in the recent cases in the House of Lords, of *Spackman* v. *Evans* (1), *Evans* v. *Smallcombe* (2), and *Houldsworth* v. *Evans* (3). In the first of those cases, a company, called the Agriculturists' Cattle Assurance Company, was formed. A deed of settlement was executed, which contained various clauses as to the admission and withdrawal of shareholders, and the transfer and forfeiture of shares. On difficulties arising in its business, a proposition was made to allow, on certain conditions, dissenting shareholders to retire on the forfeiture of their shares. This proposal, of which distinct notice had been given to all, was adopted at a public meeting of the shareholders. Spackman, a shareholder who had executed the deed, dissented from these conditions, and sought to wind up the company. In this he failed; and he was sued for calls. Pending the litigation, the directors allowed him to retire upon conditions which were not those named in the deed or in the proposal agreed to at the meeting. No notice of the conditions thus entered into with Spackman was shown to have been communicated to the other shareholders; but the fact of Spackman's retirement was known to them, and there was no imputation of any fraudulent concealment. The name of Spackman (who had performed all the conditions on which leave to retire was granted to him) was removed from the list of shareholders in 1849. Changes were afterwards made in the mode of carrying on the company's business, and dividends were paid; but Spackman was not informed of the changes; he never received a dividend, and he never was called on to take, and never did take, any part in the affairs of the company. In 1861, an order was made for winding up the company; and it was held by the House of Lords (Lord St. Leonards and Lord Romilly dissenting), that Spackman's name was rightly placed on the list of contributories. There it was brought to the knowledge of every shareholder that 52] some *compromise had been made; but, as it was not notified to them what that compromise was, the transaction was held to be void. Lord Chelmsford says (4): "The arrangement, being ultrà vires of the directors, could only be subsequently made good by the acquiescence of all the shareholders, with know-

(1) Law Rep., 3 H. L., 171.
(2) Law Rep., 3 H. L., 249.
(3) Law Rep., 3 H. L., 263.
(4) Law Rep., 3 H. L., at p. 233.

ledge of the transaction. But mere time alone, without such knowledge, could never, in my opinion, grow into proof of acquiescence, or render valid that which, without the consent of all the shareholders, was absolutely void ab initio." In the next case, *Evans* v. *Smallcombe* (1), it was held that an arrangement allowing the members of a company to retire from the company under certain conditions therein agreed to by a public meeting of the shareholders convened by a due notice, is not in itself valid, unless made in accordance with the provisions of the deed of settlement, and, if not assented to directly or indirectly, after due notice, by all the shareholders, may be impeached by any one of them; but that, if the means of notice to all appear sufficient, so as to raise a clear presumption of knowledge and acquiescence, and the arrangement is left unimpeached by any one for a great many years, the shareholder who has been allowed to retire, and whose name has been removed from the list of shareholders, will be held to be relieved from his liability as a shareholder. But Lord Cairns, in his judgment says (2): "Lapse of time clearly would not make valid that which at the beginning was invalid." In the third case, *Houldsworth* v. *Evans* (3), it was held by Lord Cranworth (who differed from the majority), that, where shareholders know that their directors have been exceeding their legal powers, and take no steps in the matter, but allow the things done to remain unimpeached for years, they must be taken to have, retrospectively, sanctioned what has been done. But Lord Cairns (4) said that it was impossible to ascribe to the mere mention of "cancelled shares" in the balance sheets the effect sought to be imputed to similar words in this case. In *Imperial Bank of China, &c.* v. *Bank of Hindustan, &c.* (5), it was held that acquiescence, to bind all the members of a company to a bargain which there is no *power to confirm, must be [53 acquiescence by every member of the company. Giffard, V.C., there says (6): "It is excessively difficult to make out acquiescence on the part of a body such as a company is. I can understand acquiescence in a case where it is in the power of the persons said to have acquiesced to confirm it; but, when it

(1) Law Rep., 3 H. L., 249.
(2) Law Rep., 3 H. L., at p., 253.
(3) Law Rep., 3 H. L., 276.
(4) Law Rep., 3 H. L., at p. 275.
(5) Law Rep., 6 Eq., 91.
(6) Law Rep., 6 Eq., at p. 100.

is not in the power of the persons said to have acquiesced to confirm it, it requires, in order to establish acquiescence, a case from which it must necessarily be inferred that every member of the company has assented." These cases clearly show that the evidence of ratification or acquiescence in the present case was insufficient to bind the general body of shareholders.

[WILLES, J. It is to be observed that those were all cases of liquidation,—a proceeding intended for the shareholders themselves.]

WILLES, J. The argument of this case has occupied a considerable time, though not longer than its importance warranted. But, when it comes to be threshed out, the facts which are material to the forming a judgment upon it appear to be shortly these:—The plaintiffs' company was formed for the purpose of working two mines, one in the island of Sombrero, in the West Indies, and the other at Lagrosan, in Spain, with a capital of 300,000*l.*, in 12,000 shares of 25*l.* each, of which 10*l.* per share was paid up. Negotiations were entered into by the company for the purchase of the mines. The Sombrero mine was duly conveyed to them; but a difficulty arose as to the title of the Lagrosan mine, and up to the month of March, 1866, the sale had not been completed; and the purchase ultimately went off. The defendants, Green and Nicholls, were the promoters of the company, and would receive a considerable benefit in the shape of bonus or commission if the company was successfully floated. They had in fact received from the vendor 10,000*l.* (in money and shares) on the conveyance of the Sombrero mine; and they were to receive a similar sum upon the completion of the purchase of the Lagrosan mine. They appear to have purchased a considerable number of shares in the company; and when the time arrived for taking them up, owing to the purchase of the Lagrosan mine being still in fieri, they were una-
54] ble *to obtain funds. Under these circumstances, it being considered that their failure to take up the shares which they had so agreed to purchase would have an ill effect upon the prospects of the company, the directors as representing the company, agreed to advance to Green and Nicholls the sum sought to be recovered in this action; and in respect of that advance the following receipt was given:—"London, March

9, 1866. Received on our joint and several account from the Phosphate of Lime Company (Limited) the sum of 7500*l.* and twenty-five debenture bonds of 100*l.* each of the company, the said cash and bonds being taken and accepted by us as an advance from the company pending the completion of M. Dumas's purchase, and to be accounted for by us jointly and severally, and repaid to the company, to the extent of 6500*l.* and fourteen of the said debenture bonds of 100*l.* each, in the event of the said purchase from any cause not being completed within three months from the date hereof." Green and Nicholls, therefore, accepted the money and the bonds as an advance to be accounted for by them to the company, to the extent mentioned in that receipt, in the event of the purchase of the Lagrosan mine not being completed within three months; and we must take it that Green and Nicholls were to have the benefit of that advance in the event of the purchase of the mine being completed. Upon the purchase falling through, a claim was made upon the defendants for the money and bonds so. advanced to them, which claim they resisted. An arbitration was proposed, and negotiations took place between the directors and Green and Nicholls which resulted in a compromise on or about the 24th of July, 1866. That compromise in effect was, that, instead of paying back the money advanced to them and returning the debenture bonds, Green and Nicholls should give up to the company 400 shares on which 10*l.* per share had been paid up, to be cancelled; and it was agreed that this should be considered as a settlement of the claim of the company against them. As these shares were not money, but were of value, the giving them up and the acceptance of them by the directors would, if authorized, be a satisfaction of their claim against the defendants. The directors, as representing the company, did accept that satisfaction by a formal resolution, and the shares were given up and were cancelled. It was suggested at the trial, that not only *was that transaction unauthorized, but [55 it was fraudulent. That charge, however, failed; and in fact all imputation was withdrawn. It must be taken, therefore, that this was a substantial transaction, and one which, if the directors had authority to enter into it, was an honest and fair transaction, and discharged the defendants as against the company.

The reply of the plaintiffs to that is, that the directors had no

authority to accept the compromise at all. I do not go along with the argument of Mr. Benjamin, that, assuming that the directors had no authority to make the compromise, yet, inasmuch as the company received some benefit from the transaction, the company are not in a condition to say that the transaction was absolutely void but only that it was what he calls relatively void, so that, if the company wished to avoid it, they could only do so by rescinding it and returning what they had received under it. That may be very good sense, if the matter be looked at in a moral point of view; but it is not law. If the act done be unauthorized, the law makes it absolutely void at the election of the person on whose behalf it is done, so that he may repudiate it or take the benefit of it as he chooses; but it is not a relative nullity, in the sense that the person not choosing to ratify it is to perform some condition precedent or do some act before he declares it to be void. It comes round, therefore, to this alternative: either the defendants must establish that the directors had authority at the time, or that the company did by their subsequent conduct assent to and ratify the act of the directors so as to bind themselves as if there had been a previous authority.

As to whether the transaction was authorized or not, it is unnecessary to say much. As to this, the 19th and the 113th clauses of the articles of association are to be considered. The 19th clause provides that "the company shall not, under any circumstances, purchase its own shares;" and the 113th provides that "the directors may decline to register any transfer of shares made by a member who is indebted to the company, and shall have a paramount lien upon all the shares of any member for the amount of any debt due from him to the company, either solely or jointly with any other person; and, if such debt be not paid within three months from the service of a notice on 56] such member requiring *him to pay such debt, together with interest and any expenses that may have accrued by reason of such non-payment, the shares of such member, or so many of such shares as shall be sufficient to pay such debt, shall be liable to be forfeited, and, by a resolution of the directors to that effect, may be forfeited accordingly; and the company may thereupon sell and transfer all or any of the shares so forfeited, and apply the proceeds of such sale in or towards payment of

the debt so due from such member as aforesaid; and the consent of such member shall not be necessary for giving validity to any sale, disposition, or transfer of any such shares." The 113th clause, therefore, gives the directors a discretion to forfeit shares held by a debtor to the company, by way of lien for the debt due: and, no doubt, if the shares in question had belonged to the defendants, and were of the value of the debt owing by them, the directors might under clause 113 have discharged the defendants by a forfeiture of the shares. But it must be by an act of the directors themselves, apart from any contract with the defendants. These shares were not in the names of the defendants, but in the names of third parties, and therefore the transaction does not fall within the 113th clause. It may be observed that the power to forfeit shares was not altogether foreign to the duty of the directors: they might under certain circumstances do so; but the taking the shares at a valuation, and forfeiting them at that price, would seem to amount to a sale. I assume, therefore, for the present, that the transaction, being between the directors and persons having control over the shares, would fall within the 19th clause. The debt may be treated as something given for the shares. This is not to be taken as an expression of decided opinion, though my mind inclines that way. It is enough to say that the transaction has the character of a sale. I assume it was so. Upon the first alternative, therefore, the defendants fail.

It remains to consider whether or not the defendants have established the second branch of the alternative, viz., that the company did ratify and adopt the act of the directors. Now, the law with respect to ratification is clear, and applies equally to cases of contract and of tort. The principle by which a person on whose behalf an act is done without his authority may ratify and adopt *it, is as old as any proposition known to [57 the law. But it is subject to one condition: in order to make it binding, it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events and under whatever circumstances. Is it proved that the company did intend to adopt the resolution of July, 1866? I may observe that the company at the end of 1866, or early in 1867 (I should say on the 6th of March, 1867), transferred its business to a new company called The Sombrero Company, upon a full

consideration, and upon an arrangement by which the shares and capital of the Phosphate of Lime Company were to be absorbed into the new company, the shareholders in the former company becoming the holders of an equal number of shares in the Sombrero Company of 10*l.* each instead of 25*l.* That transfer which was so completed in March, 1867, was taken to be beneficial to the shareholders in the Phosphate of Lime Company; and there is no suggestion that any of them did object. The result was that the capital of the Phosphate of Lime Company was treated as the capital of the Sombrero Company, and the shareholders of the new company had all the benefit of the cancellation of the 400 shares referred to in the resolutions of the 10th and 24th of July, 1866. After that arrangement so made and assented to, accounts were made out and brought before the shareholders of the Phosphate of Lime Company at the meeting in March, 1867, accompanied by a report of the directors showing the reasons for the liquidation of the old company and the future prospects of the new company, and stating the capital of the new company to be 132,000*l.*, and showing how that reduction had been effected, viz. partly by shares cancelled owing to the abandonment of the Lagrosan purchase, and partly by "shares forfeited for non-payment of calls," and partly by the reduction by the vendors of the Sombrero estate on the fully paid-up shares issued to them. It is clear, then, that the capital of the new company was reduced by, amongst other things, the 400 shares given up by the defendants on the compromise in July, 1866; and it is clear that they were intended to be included in the account submitted to the shareholders. It is said that the words "shares forfeited for non-payment of calls" do not properly describe the transaction. But, if it be intended to allege that there was improper concealment, that should have
58] *been relied on in the charge of fraud. It was involved in the abandonment of the Lagrosan purchase: it was connected with that purchase, and with the dealings with the persons who were instrumental in its negotiation. I have no doubt whatever in my mind that those words did convey to every person interested in the Phosphate of Lime Company who thought proper to make inquiry sufficient information on the subject; and, with respect to those who did not think proper to seek information, the fact that they did not choose to inquire is strong evidence

that they were satisfied to adopt the acts of the directors at all events and under whatever circumstances, and to take the benefit of the arrangement made by them in any form they thought proper. Looking to the fact that the transaction was not concealed, and that no shareholder was called at the trial to say that he did not know of it, I cannot doubt that the report and account did convey sufficient information to the shareholders as to the cancellation of the 400 shares, and that there was no one shareholder who was ignorant of it. Further, it appeared that the defendants were credited in the books of the company, under date the 21st of August, 1866, "By shares forfeited account, 4000*l.*" I believe that these are all the material facts. I think there was abundant evidence of a ratification, in the sense of an adoption of the act of the directors, either with knowledge of all the circumstances, or with an absolute intention to adopt it. All imputation of fraud was withdrawn. The transaction appears to have been a notorious one at the time. The Phosphate of Lime Company was in difficulties. A proposal was made for a transfer to the new Sombrero Company under circumstances under which every shareholder would naturally have his attention called to all the accounts and transactions of the company. Accounts were presented showing a forfeiture of shares with an amount set down as 4000*l.*, a sum which was calculated to excite attention and inquiry. No shareholder is called to say that he was not aware of the transaction. All this shows clearly to my mind that there was a ratification. The transfer to the Sombrero Company involved a ratification, because it was founded upon a reduction of the capital by means, amongst others, of the cancellation of these 400 shares. It would be a waste of time to refer to authorities to show that one who chooses to adopt the *benefit of a transaction [59 ought to be bound by it. The present case, however, goes much further than that, because, from the 6th of March, 1867, down to the 16th of May, 1870, when this action was brought, the shareholders have continued to receive dividends and to carry on the business of the Sombrero Company upon the footing of the dealings of March, 1867. That circumstance appears to me to add considerable weight to those I have already adverted to, and makes the case stronger against the company. I think it would be highly inequitable and unjust that the company should,

after so long an acquiescence, be allowed to rip up the transaction and call upon the defendants to pay back the money, without at least restoring them the shares the cancellation of which formed the basis of the arrangement which was made by the resolution of the 10th of July, 1866, and confirmed by the resolution of the 24th.

It is unnecessary to go into the authorities which were cited in the course of the argument, because I do not think any one of them affects the principle upon which our decision is founded, and from which I feel the great danger of departing. The case which was mainly relied on for the plaintiffs was that of *Spackman* v. *Evans.* (1) That was a case of very great hardship: a forfeiture of shares was unripped after the lapse of ten years, because contrary to the deed of association. Lord St. Leonards and Lord Romilly differed from the majority of the peers, not so much upon the application of the general principle of law as to acquiescence or ratification, as upon the conclusion to be drawn from the facts then before them. Balance-sheets had been put in from time to time, in the ordinary course of business, to which the attention of the shareholders might have been called, and which contained entries calculated to invite them to examine the books of the company, but not containing information as to extraordinary transactions such as those which occur in this case, of a nature to induce particular inquiry and criticism. The majority of the peers were of opinion that they ought not from the facts to draw the inference of notice, or to hold that the shareholders were to be "deemed to have had notice." Lord St. Leonards thought it was enough to *show 60] that they had the means of knowledge, and that, if the means of knowledge existed, notice ought to be imputed. I do not understand their lordships as laying down in that case any principle which should be binding as matter of law, but merely what was the inference which they, as judges of the law and the facts, ought to draw from the evidence before them. No one of the cases referred to seems to me to be at all like the present. I think the cardinal fact of the transfer of the old business of the Phosphate of Lime Company to the Sombrero Company, under the circumstances before stated, makes an end of the matter; and that the transaction as to these shares could

(1) Law Rep., 3 H. L., 171.

not and did not escape inquiry. Upon the best consideration, therefore, which I can bring to this case, I come unhesitatingly to the conclusion that there was evidence from which the jury might properly hold that the condition of ratification was fulfilled, and that the verdict ought to be supported.

KEATING, J. I am of the same opinion. This was an action for money lent; and the only plea we have to consider is one of accord and satisfaction. To prove that plea, the defendants showed an accord and satisfaction with the directors of the company by the delivery up to them of 400 shares to be cancelled, and the acceptance thereof by the directors. To meet that, it is alleged on the part of the company that what the directors did was ultrà vires and in excess of their authority. The answer of the defendants is twofold; first, that the directors did not exceed the authority vested in them by the articles of association; and secondly, that, if they did, the company,—that is, the shareholders,—with full knowledge of what the directors had done, ratified and confirmed their act.

As to the first question, I agree with the impression of my Brother Willes, that the transaction with respect to the cancellation of the shares would amount to a sale, and so fall within the prohibition of article 19. But I also agree with him that it is unnecessary to determine that, because I am clearly of opinion that there was evidence from which the jury might properly find that the company ratified the act of the directors, with full knowledge of all the facts; and that is the sole ground upon which my judgment is founded. If the question before us had been that which was before the *House of Lords in the cases [61 referred to, I must confess I should have felt some difficulty in coming to the conclusion that it was proved to my satisfaction that the shareholders, with full knowledge of the transaction, ratified that which the directors had done, with the intention of ratifying and confirming it. But that is not now the question; it is simply whether or not there was evidence upon which the jury might find acquiescence. It must be assumed that the jury have found the fact; and the only question is whether there was evidence to warrant their finding. That relieves us from all embarrassment which might otherwise have arisen from the decisions in the House of Lords.

The material facts of the present case were these:—There was a general meeting of the shareholders, convened in the usual way, at which a report was made by the directors distinctly informing the shareholders of the forfeiture or cancellation of these 400 shares, and of the diminution of the capital of the company of which the shareholders would derive the benefit, and of the proposed amalgamation or absorption of the original company into the Sombrero Company. The transfer from the old to the new company took place upon the footing of that diminution of capital, which to the extent of 4000*l.* was due to the cancellation of the shares in question. The accounts of the Phosphate of Lime Company were produced at that meeting, and the shareholders invited to investigate them, so that every one of them might, if he were so minded, have informed himself of the whole transaction; and no shareholder was called at the trial to say that he had not notice of it. The transfer and cancellation of the 400 shares took place in July, 1867, and down to the month of May, 1870, the shareholders in the extinct company have derived the benefit resulting from the consequent diminution of capital in the increased dividends on their shares in the Sombrero Company. That the jury, under these circumstances, would have found that there was a ratification, if the question had been left to them, I cannot for a moment doubt. The plaintiffs' counsel elected not to go to the jury, but preferred coming to the Court; and all that we can be called upon to say is, whether or not there was evidence of ratification for a jury. I entirely concur with my Brother Willes that it would be inequitable and unjust to come to any
62] other conclusion; and I should have much regretted *it if I had felt myself compelled to disturb the verdict which has been entered.

Brett, J. The first point to be considered in this case is, what was the real effect of the leave reserved at the trial. The case of the plaintiffs was launched, and was mainly attempted to be maintained, upon the supposition that the compromise with the defendants was the result of a fraud on the part of the chairman of the company. That ground entirely failed; and, considering that the shares in question were cancelled so long

ago, and that the plaintiffs have had all the benefits of their cancellation, and are now seeking to enforce payment of the 6500*l.* without offering to give back the 400 shares to the defendants or to pay them the dividends, it seems to me to be clear that the real and understood effect of the reservation was that the verdict upon the plea of accord and satisfaction was to stand, unless the Court should be of opinion that there was *no* evidence to support that plea. If, therefore, there was any evidence of ratification so as to bind the company, this rule must be discharged. The question, then, is, whether there was evidence of such a compromise in July, 1866, as was binding upon the company either by reason of the directors having had authority at the time to make the compromise, or by reason of a subsequent ratification by the company with knowledge of the facts. That the directors had authority to make the compromise is a proposition which I think cannot be sustained. The 18th sub-section of article 84 would seem to give the directors a limited authority to make compromises, but not to make such a compromise as this, because it would be contrary to the proviso that "the same be not repugnant to law or to any of the provisions of these articles," and a purchase of shares, which this would seem to amount to, is expressly forbidden by article 19. Although the directors had some authority to make compromises under article 113, I do not think this transaction was warranted by that article. It comes, therefore, to the question whether the act of the directors with reference to these 400 shares was ratified by the company. Now, in order to establish a case of ratification, it seems to me that it was not necessary to prove absolute knowledge on the part of every shareholder. As is pointed out by Lord St. Leonards in **Spackman v.* [63 *Evans* (1), it was not necessary to show that every shareholder had actual notice. "It is said," he observes, "that the absent shareholders in this case are not bound by the arrangement unless the appellant can prove that every one of them knew the exact nature of the transaction. How can he prove this at the close of so many years? In *Brotherhood's Case* (2), it was held that they had notice,—not that, in point of fact, such notice was proved." It is impossible to prove that every shareholder had

(1) Law Rep., 3 H. L., 222. (2) 31 Beav., 365; 31 L. J. (Ch.), 861.

notice or such a knowledge of the facts as amounts to notice. It is sufficient to show that facts were made known to the shareholders, into the effect of which they might and ought to have inquired, and to which they ought to have objected at the time, unless they intended to adopt the transaction. I think there was such evidence here. On the 5th or 6th of March, 1867, a meeting of the shareholders in the Phosphate of Lime Company was held for the purpose of considering the expediency of the absorption or transfer of that company to the Sombrero Company, with a diminished capital; and at that meeting a report was read in which it was stated, amongst other things, that that diminution of capital had been effected "partly by shares cancelled owing to the abandonment of the Lagrosan purchase, and partly *by shares forfeited for non-payment of calls.*" In order to effect a diminution of the capital, the shares under both those heads must have been cancelled. Mere forfeiture without cancellation would not have had that effect. The validity of the transfer or absorption adopted or authorized at that meeting has never been called in question. At that same meeting a copy of the accounts was put in and submitted to all the shareholders. That fact distinctly appears upon my notes. It was not like the case of the mere production of a ledger into which the shareholders could have no opportunity of looking at the time. Unless the shareholders intended to adopt the transaction, they should have inquired into the circumstances under which the cancellation took place. If they had done so, they would have been told that it was the result of a compromise. The transfer having been made to the new company, dividends have been paid upon the smaller amount of capital, and consequently at an increased rate; and, things having con-
64] tinued in this *state for two or three years, the company now seeks to recover from the defendants the sum advanced to them in 1866, and from which the directors had absolved them in consideration of the cancellation of the 400 shares; and this without giving them back the shares or paying them the dividends which would have accrued thereon. Taking all these facts into consideration, it seems to me that there was abundant evidence to justify the jury in saying that the company (that is, the shareholders), with knowledge of all the circum-

stances, ratified and adopted what had been done by the directors, and that the plea of accord and satisfaction was proved.

Rule discharged.

Attorneys for plaintiffs: *Mercer & Mercer.*
Attorneys for defendants: *Stevens, Wilkinson, & Harries.*

*CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

January 15, 1872.

65] ANDERSON and Others v. THE PACIFIC FIRE AND MARINE INSURANCE COMPANY.

Law Reports, 7 Common Pleas, 65.

Marine Insurance — Misrepresentation of a Material Fact.

On effecting an insurance on freight from Belize to R. Point on the Honduras coast (a place the exact locality of which was not known to either party) and thence to London, the agent of the assured produced and read to the agent of the assurers a letter which the owners of the vessel had received from the captain from Belize, in which R. Point was thus described:—"It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." It was admitted that this statement of the captain was made bonâ fide; but there was evidence that R. Point was not at the particular season a safe anchorage.

In an action upon the policy, for a total loss, the judge told the jury that in his opinion the letter did not amount to a statement of a fact, but merely of an opinion; and he left two questions to them,—1. Was the letter read to D., the agent of the assured? 2. Did the captain and the pilot consider that R. Point was a safe anchorage? The jury answered both questions in the affirmative, and a verdict was entered for the plaintiffs:—

Held, no misdirection, and that the verdict was warranted by the evidence.

THIS was an action upon a policy of insurance on chartered freight of the ship *Clarendon*, valued at 1000*l*., from Belize to 66] *Rendez-vous Point, in the island of Turneffe, back to Belize, thence to other ports, and finally to London.

The cause was tried before Brett, J., at the sittings in London after last term. The facts were as follows:— The plaintiffs are

merchants in London, and the owners of the ship *Clarendon*. The defendants are an insurance company in London. Rendez-vous Point, mentioned in the policy, is at the north of Turneffe, an island on the Honduras coast about twenty miles from Belize, off which there is a dangerous coral reef. A vessel called the *Gibraltar*, laden with a cargo of mahogany, had been wrecked there, and the *Clarendon*, which was then lying at Belize, was, on the 30th of November, 1870, chartered to proceed to the spot to recover the mahogany and bring it back to Belize, and thence to London, at a freight of 3*l*. 10*s*. per ton, which was about 20*s*. per ton beyond the ordinary rate of freight. The captain, by letter of the 3d of December, informed his owners of his having entered into that charterparty, and requested them to effect an insurance on freight. In that letter, which was received in London on the 28th of December, the captain thus described Rendez-vous Point: "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the place, and consider it quite safe." On the day following the receipt of that letter, one Bruce, the plaintiffs' clerk, went to the office of the defendants in order to effect the insurance. He saw Drummond, the principal manager of the company. There was a conflict of evidence as to what passed at that interview; Drummond stating that Bruce told him that Rendez-vous Point was a safe anchorage, and that his principals had received a letter to that effect from the captain; and Bruce stating that he produced the captain's letter and read Drummond the extract above set out, adding no statement of his own, that Drummond asked him whereabouts Rendez-vous Point was, and he told him he did not know, and that Drummond took time to consider, and next day accepted the insurance at a rate somewhat higher than the ordinary rate of insurance from Belize. So entirely ignorant were both parties at the time of the name and position of Rendez-vous Point, which does not appear in the ordinary charts, though it is the point of departure for vessels sailing from Belize for Europe, that it was called in the slip *"Rendennis Point." The policy was dated [67 the 7th of January, 1871.

The *Clarendon*, in pursuance of the charterparty, proceeded to Rendez-vous Point, and the captain with a pilot went in a boat through an opening in the reef, and, finding what they consi-

dered good holding ground, took the vessel in and anchored her. The spot where she lay, though sheltered by the reef from the waves, was not sheltered from wind. After she had been there eight or nine days, a storm arose, and the vessel was totally lost.

There was evidence on the part of the defendants that Rendez-vous Point was a dangerous place for a vessel to anchor during the hurricane months, it being exposed to what are called there the "northers." It was conceded that the conduct of the assured and also of the captain was perfectly bona fide; but it was contended that in what passed between Bruce and Drummond when the insurance was effected there was a concealment or a misstatement of a material fact, so as to vitiate the policy.

The learned judge left it to the jury to say,—first, was the letter of the 3d of December, 1870 (that is, the material part of it), read to Drummond?—secondly, did the captain and the pilot consider that Rendez-vous Point was a safe anchorage? The jury answered both questions in the affirmative; and the learned judge thereupon said, there was no concealment; and directed the jury to find for the plaintiffs.

Prentice, Q.C. (*J. P. Murphy* with him), moved for a new trial, on the ground of misdirection and that the verdict was against evidence. The substance of the representation made by Bruce to Drummond was that Rendez-vous Point was a safe anchorage, and well sheltered; and this all the evidence negatived. After the finding of the jury, it must be taken that the material part of the captain's letter was read to Drummond. But the reading of that letter by the plaintiffs' clerk amounted to a representation by him that he believed the fact to be as therein stated. It is the same as if the captain had gone to the office himself and made the statement.

[BRETT, J. The question is, did Bruce assert that it was a safe anchorage, or only that the pilot and the captain thought it so?]

68] **Ionides* v. *Pacific Insurance Company* (1) is an authority to show that what passed substantially amounted to a representation of the fact by Bruce. Blackburn, J., delivering the judgment of the Court, says (2): "It was argued that a representation, if only as to an expectation or belief, is substantially complied

(1) Law Rep. 6 Q. B., 674.

(2) Law Rep. 6. Q. B., at p. 683.

with if the assured really had honestly entertained that expectation on sufficient grounds, and that the representation that he 'thought' the ship a Norwegian ship was literally true. We think this expression tantamount to an assertion that she was the Norwegian."

[WILLES, J. You must make out that the statement contained in the captain's letter is not merely an expression of opinion, but an assertion of a fact.]

The evidence shows that the captain could not really have believed that Rendez-vous Point was a safe anchorage.

WILLES, J. This is an action on a policy of insurance on freight of a ship called the *Clarendon* from Belize to Rendez-vous Point, thence back to Belize, and thence to London. The vessel was lost in the course of that voyage, and the defendants, who underwrote the policy, now seek to be discharged from liability as insurers, on the ground of an alleged material misrepresentation by the assured to their agent on the occasion of the policy being entered into. There is no doubt that a material misrepresentation, though perfectly honest at the time, made with the intent that it should be acted upon by the assurer, and which has led to the policy being granted, will defeat the policy. The rule as to the good faith which is required to be observed on the effecting a policy of insurance is so strict that the assured is bound to make known to the underwriter all the information in his power which is not within the ordinary knowledge and experience of an underwriter; and further, that, if a material fact which is stated to the underwriter turns out to be untrue, or a fact which is material to be stated is concealed from the underwriter, the policy is void, notwithstanding the assured may have acted with perfect good faith and honesty of intention. In the present case there was no concealment of anything known to the assured. The jury have found that the agent of the assured, at the time of affecting the policy, read to the defendants' *manager all that the assured themselves [69 knew as to the voyage, and especially all that they knew as to the security of the anchorage at Rendez-vous Point. He read to him the letter from the captain of the *Clarendon*, in which he said: "It is considered by the pilot here as a good and safe anchorage, and well sheltered. I have been out and seen the

place, and consider it quite safe." It is said that that was a misrepresentation; and I think it must be assumed for the present purpose, that, if that is to be taken to be a statement by the master that Rendez-vous Point was a safe anchorage and well sheltered, that was a misstatement, because there was abundant evidence that it was not a good and safe anchorage; and on that the learned judge did not ask the jury to pronounce any opinion. The question, therefore, becomes this, whether the statement of the master in that letter amounts to an absolute statement of a fact or only to a statement of opinion. If the latter, it may be that, if it was an opinion which the writer of the letter really did not entertain,—a conclusion which the jury would easily have arrived at if they thought no person could honestly have entertained such a belief,—I think the assured would be bound. But any consideration of that kind is excluded by the finding of the jury, because, in answer to the second question which was put to them, they find that it was an opinion honestly formed. Then, do the words amount to an absolute statement of a fact? I am of opinion that they do not, and that they could not have been so understood by Drummond when he took the risk. Rendez-vous Point does not appear to have been a place very well known to either party. It was, so to speak, a questionable place. All the information the defendants' manager has he obtains from a person who professes not to know anything about it. It was considered by the pilot as a good and safe anchorage; and it was considered by the jury that the pilot so thought it. The rest of the statement means this: "From the information I have received from the pilot, and my own inspection, I consider it quite safe." Fraud being out of the question, I think that is no misrepresentation. Unless the honesty of the captain was to be assailed, I do not see any ground for saying that the jury ought to have come to any other conclusion than they did; and I do not understand from the learned judge that he is dissatisfied with the verdict. I therefore think there ought to be no rule.

70] *Byles, J. I am of the same opinion. The statement in the captain's letter, which the jury find was read to the defendants' agent at the time of effecting the policy, and which they also find to be true, is a representation, not that Rendez-vous Point was a safe anchorage, but that two persons con-

sidered it so. There being no fraud, I think there should be no rule.

GROVE, J. I am of the same opinion. Mr. Prentice says that the words are to be read as if they were an assertion by the plaintiffs' agent that the spot in question was a safe anchorage, and that the insurance was effected upon the faith of that representation. I do not think that is the true effect of the production of the letter; and I think the words exclude Mr. Prentice's conclusion. The real question in the case referred to of *Ionides* v. *Pacific Insurance Co.* (1), was the identity of the vessel on which the goods were shipped,—whether it was the *Socrates*, a new Norwegian vessel, or the *Socrate*, an old French vessel. Just before the passage in the judgment cited by Mr. Prentice, Blackburn, J., says: "Though we see no reason to doubt that the jury were quite right in finding that both parties were intending to insure the goods by the ship on which they were actually shipped, yet, when we find it not disputed that the one party expressly asked the question whether the ship was the Norwegian ship *Socrates*, and was told by the other party that he thought it was, we cannot think that there was any evidence on which the jury could properly find that the defendants entered into a contract to insure any other ship than the *Socrates*. The most that could be legitimately found was that there was no contract, the parties not being ad idem. And we think also that, if the representation was made, however honestly and innocently, that the ship was a new ship, when, in fact, she was an old one, the policy was vitiated thereby, for the age of the vessel must be material in considering the premium." I do not think that case has any bearing upon the present. All that the representation here amounts to is the opinion of the captain, not recklessly formed, but founded upon what he fairly deemed to be competent knowledge of the pilot and his own personal observation.

*BRETT, J. Upon the whole, I think I left the right [71 questions to the jury. They were these:—"1. Did Bruce read to Drummond the extract from the captain's letter? 2. Is the representation in that extract true? 3. Did Bruce, without

(1) Law Rep., 6 Q. B., 674.

reading the extract to Drummond, state to him that the place to which the ship was going was a good, well-sheltered, and safe anchorage? 4. If yes, was the place a good, well-sheltered, and safe anchorage, in the sense in which the statement was understood by Drummond?" The jury answered only the first two questions. I thought that concluded the case, and therefore did not press them to answer the others. The contest at the trial was whether the letter was read or not. Although neither Bruce nor Drummond seemed to know anything about Rendez-vous Point, the island itself is well known; and Rendez-vous Point is the point of departure from Belize. The Insurance was from Belize to Turneffe to take the cargo of a wrecked vessel. The agent of the assurers therefore knew it was an unusual risk that he was asked to take; and an unusual premium was paid. The substance of what I left to the jury was, what was the meaning of the extract, and was the statement true. I thought the interpretation of the letter was for the Court; and I stated my view of it, viz. that the pilot and the captain, after examining it, thought the anchorage a safe one. The jury agreed with me. I cannot doubt that that was the true meaning of the letter, and that it was so understood by Drummond. Although the reef did not protect the vessel from the wind, there was evidence that it afforded a protection against the waves. I see no reason to be dissatisfied with the verdict.

Rule refused.

Attorneys for defendants: *Holmer, Robinson, & Stoneham.*

Jan. 31, 1872.

75] *RICHARDSON AND SISSON v. THE NORTH EASTERN RAILWAY COMPANY.

Law Reports, 7 Common Pleas, 75.

Railway Company — Carriers — Bailee — Negligence.

A valuable greyhound was delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid. At the time of delivery the greyhound had on a leathern collar

with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of the strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened, it slipped its head from the collar and ran upon the line and was killed:—

Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company.

Stuart v. *Crawley* (2 Stark., 323) distinguished.

APPEAL against a decision of the County Court of Westmoreland, holden at Appleby, in an action brought by the plaintiffs, joint owners of a greyhound bitch, to recover 50*l.* damages against the North Eastern Railway Company, for the loss of the animal through the alleged negligence of the company's servants.

1. On the 19th of February, 1870, the greyhound was taken by Sisson to the defendants' station at Temple Sowerby, for the purpose of being conveyed thence to Morpeth, another station on the defendants' line of railway. Sisson applied to the collector at Temple Sowerby station, and stated that he required the greyhound to be conveyed to Morpeth. He paid the fare which the collector demanded, and gave the greyhound into the charge of the guard of the train by which she was to be conveyed on her journey.

*2. The plaintiffs did not declare the value of the dog, [76 and paid no extra charge for its conveyance. No ticket was issued. The greyhound, when delivered to the guard, had round her neck a collar of leather, and was clothed with a sheet, which, however, did not so cover the collar as to prevent its being examined. The bitch was proved to be of the value of seventy guineas. She was safely carried to Kirkby Stephen station, where the train from Temple Sowerby stopped. The remainder of the journey to Morpeth was intended by the defendants, for their own convenience, to be performed in another train, which, on its arrival from Tebay, was to proceed from the Tebay side of Kirkby Stephen station; the train from Temple Sowerby arriving at the other side (known as the Eden Valley side) of the Kirkby Stephen station. The greyhound was taken from the van in which up to that point she had been carried, and was taken from the Eden Valley side of the platform to the Tebay side, to await the arrival of the train from Tebay, then due.

The train from Tebay being a few minutes late, the greyhound was fastened by the company's servant to an iron spout by a strap which one of the plaintiffs before delivery to the defendants had attached to her collar; and, having been so fastened, she was left alone to await the arrival of the train. Within three minutes afterwards she slipped her head through the collar, and escaped, and ran away down the line. The next day she was found dead, having been run over by a train.

3. At the time Sisson brought the greyhound to Temple Sowerby station, a bill, a copy of which marked B. was annexed to the case, was exposed on a board in the open platform shed of the station, and another bill, a copy of which marked A. was also annexed to the case, was tacked to the wall inside the passengers' waiting-room. The notice marked B. but which had no reference to dogs (1), could be easily seen by any person en-
77] tering the open *platform shed where tickets are given; but the printed paper marked A., which was a time-table, and contained a marginal note about dogs (2), could only be seen by persons who had entered the waiting-room; but there was no evidence to show that Sisson had, and Sisson swore that he never had, seen or heard of either of these notices, or of the terms contained therein.

(1) The material part of this notice was paragraph 9, which was as follows:—

"The said company hereby give notice and declare that they never have been, and are not, and decline to become, common carriers of horses, cattle, sheep, pigs, and other animals, and will only undertake the carriage thereof upon a special contract in each case first entered into by them with the owner or person sending or delivering the same, the special terms whereof may be learnt on application to the company's collector at the station, and will appear in the note at the foot of or indorsed upon the ticket or memorandum of each such contract issued or made by him, and according to which alone the company authorize him to contract on their behalf."

(2) The note in question was as follows:—

"HORSES, CARRIAGES, DOGS. The company are not carriers of horses, cattle, dogs, and other animals, which are received, forwarded, and delivered solely on and subject to the following conditions, &c., &c.

"The company will not accept dogs for conveyance unless they have proper chains and collars attached, and then only upon condition that they are not responsible for loss of or injury to the animals in the event of these fastenings proving insufficient; and they will not receive dogs for conveyance except on the terms that they shall not be responsible for any greater amount or damages for the loss thereof or injury thereto beyond the sum of 2*l*., unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent, paid upon the excess of value so declared."

4. The defendants are not common carriers of dogs; but it was proved that on one previous occasion they had for hire carried the same dog for the plaintiffs, when no ticket was given; and there was no evidence that the plaintiffs had on that occasion any knowledge of the above notices.

5. It was contended for the plaintiffs, that the defendants having undertaken, for valuable consideration, to carry the dog safely from Temple Sowerby station to Morpeth, on the complete delivery of the dog to them they became responsible for the security of the dog, and the dog then remained at the risk of the defendants, who were bound to lock the dog up or take other proper means to secure it; that the defendants were guilty of negligence, in the first place, in not making the strap secure, and, in the second, in tying the dog to an iron spout in the open station of Kirkby Stephen and leaving it alone in a strange place, amongst strangers, instead of keeping it either in hand or in the van of the Temple Sowerby train or in a building until the Tebay train arrived, and then transferring the dog direct from the Temple Sowerby train to the Tebay train; that there was no notice to the plaintiffs of any special conditions by which the company limited their liability; *and that, having [78 been guilty of negligence, the defendants could not take advantage of their own wrong or avail themselves of any notice to the purport or effect of the notices above referred to.

6. It was contended for the defendants that the loss arose through no negligence on their part, but from the insecurity of the collar placed on the greyhound by the plaintiffs; and that, the defendants not being common carriers of dogs, but only professing to carry dogs on the terms stated on the bills marked A. and B., they were not liable at all under the circumstances, and in any event could not be liable in damages beyond 2*l*.

7. The judge gave a verdict for the plaintiffs for the full amount claimed, viz. 50*l*., on the several grounds following:— The defendants were guilty of negligence in not seeing that the strap was properly secured when the dog was in their charge, and also in leaving the dog alone amongst strangers in a strange place in the station at Kirkby Stephen tied to a spout from which it almost immediately escaped, instead of securing it in the van or in some other safe place, they being responsible for

its security. The collar might be sufficiently fastened for ordinary circumstances; but the dog, being left alone, fought itself loose, which in all probability would not have happened if it had been conducted by one of the company's servants from one van to the other. The printed paper A. suggested as a notice, is not a notice within the meaning of the statute (17 & 18 Vict. c. 31, s. 7) for several reasons, viz: It does not purport to be a public notice, but merely a time-table showing the times of arrival and dispatch of trains; it is not signed by any authority of the company: the paragraph applying to dogs is a mere marginal note, and is in no way a leading feature in the document: the notice B. does not apply to dogs unless specifically named, and is not in conformity with the Railway and Canal Traffic Act, but is in small print, and is directly at variance with the requirement of the statute that such a notice shall be in legible characters. There should have been a special contract signed by the parties. In *Peck* v. *North Staffordshire Ry Co.* (1), the House of Lords held that "all the parts of s. 7 of 17 & 18 Vict. c. 31 must be read together; and, not only must the terms limiting liability be reasonable, but they must be embodied in 79] a special *contract in writing signed by the owner or sender of the goods." It is no defence in this case for the company to say that the dog was delivered to them so near to the time of the departure of the train as not to afford time for giving a ticket, as they might well have refused to take it until the next train.

The question for the opinion of the Court was, whether or not the verdict should stand.

Shield, for the defendants. The 7th section of the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) has no application to this case. The company not being common carriers of dogs, they can only be liable as bailees on the terms of the notices A. and B., upon which terms alone the collector had authority to contract on their behalf; and, if he exceeded his authority in this respect, the company are not responsible. *Belfast and Ballymena Ry. Co. and Londonderry and Coleraine Ry. Co* v. *Keys* (2). Assuming there was a contract here, there was no evidence of negligence on the part of the company or their servants; and if there was, the negligence of the plaintiffs themselves in delivering the

(1) 10 H. L., 473. (2) 9 H. L., 556.

greyhound to the company with a collar so insecurely fastened as to enable her to escape, materially contributed to the loss. *Slim* v. *Great Northern Ry. Co.* (1), was also referred to.

Kemp, for the plaintiffs. Contributory negligence is for the jury; and the judge must be taken to have negatived it. The case finds that the company are not common carriers of dogs; but they are still liable, as common bailees, for negligence. Neither of the notices having been brought home to the knowledge of the plaintiffs, and the person to whom the greyhound was delivered being in the apparent position of one having authority to contract for the company, and it having been proved that the greyhound had on a former occasion been conveyed by the company for the plaintiffs upon the same terms, it is not competent to them now to set up a contract different from that which would ordinarily be implied from the circumstances. A dog, although not specifically mentioned in the proviso as to the limitation of liability, is within s. 7 of 17 & 18 Vict. c. 31: *Harrison* v. *London and Brighton Ry. Co.* (2).

**Shield*, in reply. The 7th section of 17 & 18 Vict. c. 31, [80 is applicable only to common carriers in respect of things as to which they hold themselves out as common carriers. *Van Toll* v. *South Eastern Ry. Co.* (3), *Cahill* v. *London and North Western Ry. Co.* (4), *Zunz* v. *South Eastern Ry. Co.* (5), were referred to.

WILLES, J. This case involves a question of considerable importance with reference to the duty of railway companies to give notice where goods are to be carried only upon special terms, and with reference also to the ostensible authority of their collectors to make contracts which shall be binding upon them. We will therefore take time to consider it.

Cur. adv. vult.

WILLES, J., delivered the judgment of the Court

This case was argued before my Brother Montague Smith and myself at the sittings in banc after last Trinity Term; and

(1) 14 C. B. 647; 23 L. J. (C. P.) 166.
(2) 2 B. & S. 122; 29 I. J. (Q.B.), 209.
(3) 12 C. B. (N. S.), 75; 31 L. J. (C.P.), 289.
(4) 10 C. B. (N.S.), 154; 30 L. J. (C.P.), 241.
(5) Law Rep. 4 Q. B., 539.

it has stood over longer than we intended, in consequence of the difficulty of communicating with him arising from the recent changes in the constitution of the Court.

It was an appeal against a judgment given by a county-court judge in favor of the plaintiffs for the sum of 50*l.*, being the extreme amount to which his jurisdiction in such a case extends, in respect of the loss through the alleged negligence of the servants of a railway company of a valuable greyhound bitch which had been delivered to them by the plaintiffs to be carried by their railway. The facts were these :— The greyhound was taken by one of the plaintiffs to the defendants' station at Temple Sowerby, for the purpose of being conveyed thence to Morpeth, and there delivered to the guard of the train by which she was to travel, the fare demanded by the collector having been duly paid. No declaration of the value of the greyhound was made, or any extra sum paid for insurance; nor was any ticket given to the plaintiffs. At the time she was delivered to the guard, the greyhound had a leather collar round her neck, to which was fastened a strap. The company only professed to carry dogs upon the terms of 81] certain *notices; and it was insisted before the judge of the county-court, as it was again insisted before us upon the argument of the appeal, that the guard had no right to receive the dog upon any other terms than those contained in the notices. In the view we take of the case, it becomes unnecessary to discuss that, because it is expressly found in the case that the company are not common carriers of dogs, and therefore they stand in the position of ordinary bailees, and are only liable in respect of some negligence established against them by evidence, and are not liable if the loss was occasioned or contributed to by the negligence of the person who delivered the dog to them to be carried. It was contended on the part of the company in the court below that there had been no negligence on their part, or that at all events there was contributory negligence on the part of the plaintiffs; and, with a view to see whether that is so or not, it is necessary to state the facts further. When the train was on its way, and had arrived at Kirkby Stephen station, it was necessary for passengers and goods intended for Morpeth to be removed to another train on the other side of the station. The train by which the rest of the journey was to be performed not being ready, the guard by

means of the strap which was attached to her collar fastened the greyhound to an iron spout on the platform, to wait until the train came up. The fact of her having been fastened to an iron spout has nothing to do with the decision of the case: it is not stated whether the spout was sufficient for the purpose or not. She was fastened by means of a strap which one of the plaintiffs had himself attached to the collar for the purpose of securing her. Being so fastened, she slipped her head through the collar and ran on to the line and was killed by a passing train.

The county-court judge decided that the defendants were responsible for the escape and consequent destruction of the dog, on the ground that they by their servants were guilty of negligence and that there was no contributory negligence on the part of the plaintiffs. We are clearly of a different opinion. The county-court judge in deciding as he did appears to have proceeded upon a supposition that the case fell within the ruling of Lord Ellenborough in *Stuart* v. *Crawley*. (1) That case, however, in our judgment *differs in some essential particulars [82 from the present. It was an action against a carrier of goods by the Grand Junction Canal for negligence in losing a valuable greyhound which had been delivered to him to be carried from London to Harefield Lock. It appeared that the servant of the plaintiff took the dog to the defendant's warehouse with a string about his neck, and the defendant's bookkeeper gave a receipt acknowledging the delivery; that the dog was afterwards tied by the cord to a watch-box, but within half an hour afterwards slipped his head through the noose, and was lost. It was sought to charge the plaintiff with negligence in not delivering the dog to the defendant's bookkeeper in a state of security, he having no collar, but merely a cord round his neck, which was insufficient; and the case was sought to be assimilated to that of a delivery of goods imperfectly packed. But Lord Ellenborough held that the defendant was responsible. "The case," he said, "was not like that of a delivery of goods imperfectly packed, since there the defect was not visible; but in this case the defendant had the means of seeing that the dog was insufficiently secured. After a complete delivery to the defendant, he became responsible for the security of the dog:

(1) 2 Stark., 323.

the property then remained at the risk of the defendant, and he was bound to lock him up or to take other proper means to secure him. The owner had nothing more to do than to see that he was properly delivered, and it was then incumbent on the defendant to provide for his security." That case is obviously different from this. Here, the greyhound when delivered to the guard had a leathern collar on with a strap attached to it, indicating that the strap was the thing by which she was to be secured. If it was negligence on the part of the guard to fasten her by the strap, it was a negligence which was suggested by the person who delivered her to him without notice that the fastening was an unsafe one. There are, therefore, two important distinctions between that case and the present,—first, that there the defendant was a common carrier, and here the defendants are not,—and, secondly, that, when the dog was delivered to the defendants' servant, he had the means of seeing that it was insufficiently secured, whereas here the mode of securing the dog was that which is ordinarily adopted, viz. by a collar and strap.

83] *My Brother Smith and myself are therefore of opinion that the decision of the county-court cannot be sustained, and must be reversed. In this we only follow the course pursued by this Court in the case of *Talley* v. *Great Western Ry. Co.* (1); and, if the rule laid down in *Schroder* v. *Ward* (2) were followed, it ought to be reversed with costs; but we do not feel inclined to act upon that rule here, because there was some laxity on the part of the defendants' servants in receiving the dog to be carried without giving a ticket. The defendants would probably not press for costs.

Judgment reversed.

Attorneys for plaintiffs: *Kynaston & Gasquet, for Bleaymire & Shepherd, Penrith.*

Attorney for defendants: *R. J. Jarvis, for Hutchinson & Lucas,* Darlington.

(1) Law Rep. 6 C. P. 44 (2) 13 C. B. (N.S.) 410; 32 L. J. (C.P.), 150.

*CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

MICHAELMAS TERM, XXXV VICTORIA.

Nov. 13, 1871.

BUXTON v. RUST.

Law Reports, 7 Exchequer, 1.

Sale of Goods — Memorandum in Writing — Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17.

The plaintiff, on the 11th of January, 1871, bought of the defendant a parcel of wool worth more than 10*l.*, "the whole to be cleared in about twenty-one days." A memorandum of the terms of the bargain was handed by the plaintiff to the defendant. On the 8th of February the defendant wrote: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." The plaintiff had, in fact, completed his part on the true construction of the contract. On the 9th of February, in answer to the plaintiff's request to see a copy of the contract contained in the memorandum of the 11th of January, defendant wrote in these terms, inclosing a copy: "I beg to enclose copy of your *letter* of the 11th of January:"—

Held, that the letter of the 9th of February, with its inclosure, taken in connection with that of the 8th, constituted an unambiguous recognition of the existence of the contract and of its terms; and that there was therefore a sufficient memorandum in writing signed by the defendant to satisfy the Statute of Frauds, s. 17.

THIS was an action for the non-delivery of wool, under a contract between the plaintiff and the defendant. The defendant, amongst other pleas, denied the contract.

2] *At the trial before Pigott, B., at the Middlesex sittings, in Trinity Term, 1871, the following facts were proved :—

The plaintiff is a dealer in wool in London, and the defendant a farmer and cattle dealer, at Little Leighs, near Braintree. On the 11th of January, 1871, the parties met at Braintree, and entered into a contract for the purchase by the plaintiff from the defendant of some wool. The following memorandum, containing the terms which had been agreed upon, was drawn up and signed by the plaintiff, and handed to the defendant :—

"Bought Mr. G. J. Rust's (the defendant's) wool as examined at 15*d.* per pound, net cash; greasy and damaged, at 12*d.* per pound, net cash; to be weighed and paid for on the premises, one half; and the whole to be cleared in about twenty-one days. The wool to be delivered at the Chelmsford railway station free of charge, net weight." The wool was worth 150*l.*

On the 7th of February the plaintiff intimated to the defendant that he was coming to Braintree to weigh and pay for the wool, whereupon the defendant, on the 8th of February, wrote him thus: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off as you have not completed your part of the contract. I shall now sell the wool to you again at a different price, or shall sell it to some one else. At the same time I shall be at Braintree to-morrow, Thursday, at eleven o'clock, ready for a fresh deal if you please to come; but do as you please about it. Yours, G. J. Rust." The plaintiff had started to weigh the wool before this letter reached him, and on reaching Braintree the defendant told him verbally he could not have the wool. At the same interview the plaintiff asked for a copy of the contract, and the next day received the following letter from the defendant signed by him:—"9th February. Dear Sir, I beg to enclose copy of your letter of the 11th of January, 1871" [here followed a copy of the memorandum of the 11th of January.] The plaintiff subsequently applied to the defendant for delivery of the wool, but the defendant took no notice of the application. This action was then brought.

It was contended that the defendant was not liable, inasmuch

3] *as there was no sufficient memorandum in writing of the

contract signed by him to satisfy the Statute of Frauds, s. 17. The learned judge ruled that there was, and asked the jury whether the plaintiff, although more than the actual twenty-one days had elapsed, had fulfilled his part of the contract. The jury found that he had, and a verdict was entered for him for 150*l.*, with leave to move to enter a verdict for the defendant.

A rule was accordingly obtained on the ground that there was no memorandum signed by the defendant sufficient to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 17.

Nov. 13. *Powell, Q.C.*, and *R. Vaughan Williams*, showed cause. The letter of the 9th of February, inclosing the copy contract is a sufficient recognition of the existence of that contract, and of its terms. At all events the two letters of the 8th and 9th of February, taken together are enough—and the former can be relied on by the plaintiff; for it is sufficiently connected with the memorandum to be admissible. It is true that in the letter of the 8th of February the defendant insisted on a construction of the contract which differs from that of the plaintiff, but that is consistent with an unqualified admission that the contract existed; *Bailey* v. *Sweeting* (1); *Gibson* v. *Holland* (2); *Wilkinson* v. *Evans* (3).

Garth, Q.C., and *Shaw*, in support of the rule. The letter of the 9th enclosed a copy of the memorandum, but does not recognize or admit it as containing the terms of the contract, but describes it simply as a "letter." In *Cooper* v. *Smith* (4), a subsequent letter referring to, but not actually recognizing, a previous memorandum, was held insufficient; *Richards* v. *Porter* (5) is in point. There a letter referring to a previous invoice, but stating that the goods had not been supplied in time, was held not to constitute a note in writing. Secondly, with regard to the letter of the 8th of February, it is not sufficiently connected with the memorandum to be available to the plaintiff.

MARTIN, B. I am of opinion that the judge's ruling in this *case was right. It appears that, on the 11th of January, the [4 plaintiff and defendant met and made a bargain for the pur-

(1) 9 C. B. (N. S.), 843; 30 L. J. (C. P.), 150.
(2) Law Rep., 1 C. P., 1.
(3) Law Rep., 1 C. P., 407.
(4) 15 East, 108.
(5) 6 B. & C., 437.

chase, by the plaintiff from the defendant, of some wool; and as the purchase money was more than 10*l.*, it was necessary that the terms of the bargain should be evidenced by writing. Accordingly, a memorandum was drawn up and signed by the plaintiff, and handed by him to the defendant, which, we must take it, correctly represented what the contract really was, and according to which the wool was to be cleared in "about twenty-one days." On the 8th of February, more than the actual period of twenty-one days having elapsed, the defendant wrote the plaintiff a letter in which he says: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." Now what is the true meaning of this? Can it be anything but this: "You and I have a contract" — for a "deal" must mean a contract — "and according to my reading of one of the terms of it, you have not completed your part, and so I give you notice that it is off." Then the parties met, and the plaintiff asked for a copy of the "contract;" and the defendant in reply, on the 9th of February, wrote as follows: "I beg to enclose copy of your letter of the 11th January, 1871" [then followed a copy of the memorandum.] Now it is said that because the defendant uses the words "copy of your *letter*" he has not recognized the existence of the contract contained in the enclosed memorandum. I cannot take this view of the matter. But, at all events, taking the two letters of the defendant together, I think they amount to a recognition by him that there was a contract with the plaintiff on the true construction of which he thought that he was free, and that the memorandum of the 11th of January contained the terms of that contract. This being so, s. 17 of the Statute of Frauds is satisfied; for it has been frequently held that all that is necessary is to show written evidence of the true terms of the bargain, signed by the party to be charged. Here, it seems to me, there was ample evidence effectually to bind the defendant.

With regard to the cases cited for the defendant, they are, in 5] *my judgment, perfectly correct; and I do not think my conclusion in the present case is contrary to any of them. No

doubt attempts have often been made to make some writing, never intended to be, or to recognize, a contract — such, for example, as an invoice — binding on the persons signing it. A writing of that character has rightly been held insufficient. But here the defendant has signed documents which unequivocally recognize the existence of a contract in the terms of the memorandum, and it is consistent with all the authorities to hold that signature enough to satisfy the statute.

CHANNELL, B. I also think this rule should be discharged. In order to succeed, the plaintiff must show, first, that there was a contract, and, secondly, that his part of it has been fulfilled; and the two questions, whether there was a contract, and if there was, whether it has been fulfilled, are quite distinct. The jury have answered the latter in the plaintiff's favor, and all we have to decide is whether there was a sufficient memorandum in writing of the contract or not. Now, all that the statute requires is that the terms of the bargain should be proved by written evidence. Suppose, for instance, an agreement to buy goods at a fixed price, and a memorandum drawn up silent as to price, although the price was actually fixed, there would be no good contract. Again, a memorandum not disclosing the names of both parties would not be a good contract. But here all the terms were reduced to writing, and the defendant has, in fact, admitted that the written paper contained them all. If, when he inclosed the copy memorandum, he had said, "I send you a copy of your letter, but it does not constitute evidence of any contract between us, because one term agreed on between us is entirely omitted," the case would have been different. But he does nothing of the sort. He had put a construction on one of the terms which is incorrect, as the jury have found, and made that an excuse for withdrawal; but his admission of the contract and its terms was unequivocal. The case cited as to the invoice is distinguishable. An invoice alone is no contract, although in some cases, as when a memorandum is indorsed upon it, it may be evidence of one. I am therefore of opinion that the judge's ruling was right, and that the verdict ought to be sustained.

*CLEASBY, B. I am of the same opinion; and when the [6 facts of this case are ascertained, I think it free from doubt.

The plaintiff and defendant had a "deal" for wool in January. A memorandum containing all the terms was drawn up, signed by the plaintiff, and handed to the defendant. The fact, therefore, of there being a contract is clear. Then a dispute arose because the plaintiff did not take away all the wool in twenty-one days, and the plaintiff demands to see a copy of his memorandum; and the question is whether the letter of the 9th of February recognized a copy of the terms of the contract or of what was the plaintiff's "letter" only. If the defendant only recognized a copy of a *letter*, there is no sufficient note in writing of the contract. But the previous circumstances show that such cannot be the proper construction of the language he uses. First, there is the letter of the 8th of February, referring to the "deal" in January, and not in any way repudiating it, but insisting on a particular construction of one of its terms. Then the parties meet, and the plaintiff asks in terms for a copy of "the contract;" and then the defendant sends, in the letter of the 9th, a copy of the document which he had received as a memorandum on the 11th of January. Under these circumstances, his calling the inclosure a copy of a "letter" comes to nothing. It really was a copy of the memorandum, and was sent as such by the defendant. I am of opinion that by so sending it in a letter signed by himself, the defendant bound himself within the 17th section of the statute.

Rule discharged.

Attorneys for plaintiff: *Roy & Cartwright.*
Attorney for defendant: *Woodard.*

Nov. 17, 1871.

7] *HEAD v. TATTERSALL.

Law Reports, 7 Exchequer, 7.

Vendor and Purchaser — Sale of Specific Chattel — Right of Return — Injury to Chattel whilst in Purchaser's Possession — Warranty — Knowledge of Breach of Warranty.

The plaintiff, on Monday, the 13th of March, 1871, bought a horse of the defendant, warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer

its description up to the Wednesday evening following the sale. Previous to removing it from the defendant's premises he was told by the groom who had charge of it, but who was not in the defendant's employment, that it had not, nor had it, in fact, been hunted with the Bicester hounds. The plaintiff, nevertheless, took the horse away. Whilst it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening, and brought an action to recover the price he had paid for it:—

Held, first, that the plaintiff's conduct in removing the horse after the information given him by the groom did not deprive him of his right under the contract to return the horse; and, secondly, that his right to return it was unaffected by an accident having happened to it whilst it was in his possession, without neglect or default on his part.

DECLARATION. 1st count: for breach of a warranty that a certain horse bought by the plaintiff of the defendant had been hunted with the Bicester and Duke of Grafton's hounds.

2d count: that the defendant, by warranting that a certain horse had been hunted with the Bicester and Duke of Grafton's hounds, sold the same to the plaintiff for an agreed price paid to the defendant; that the warranty was upon the condition that the defendant should not be responsible unless the plaintiff returned the horse before 5 o'clock on the Wednesday evening next after the sale: yet the horse had not been hunted with the Bicester, &c., hounds, and was returned before the time specified.

3d count: for money received to the plaintiff's use.

The defendant denied the warranties and breaches alleged in the 1st and 2d counts, and further pleaded to the 2d count, 6thly, that it was a condition that the horse, if returned, should be returned in the same state as that in which it was delivered to the plaintiff, and without having been injured; and that it was returned in an injured and damaged state. To the 3d count, he pleaded never indebted.

*Replications: 1st, joining issue on all the pleas; and, 2dly, [8 to the sixth plea, that it was a further condition that the plaintiff might return the horse, although injured and not in the same state as when it was delivered to the plaintiff, if such injury and alteration of condition were not caused by the plaintiff's neglect or default; and that the horse's not being in the same state, and being injured when returned, was not caused by any neglect or default of the plaintiffs. Issue.

The cause was tried before Kelly, C. B., at the Middlesex sittings after Trinity Term 1871, when the following facts were

proved: The plaintiff, on Monday, the 13th of March, 1871, bought of the defendant, who is an auctioneer, for 43*l.* 1*s.*, a horse, described in the catalogue as having been hunted with the Bicester and Duke of Grafton's hounds. The contract of sale contained a condition that "horses not answering the description must be returned before 5 o'clock on Wednesday evening next; otherwise the purchaser shall be obliged to keep the lot with all faults."

After the sale the plaintiff learnt from the groom under whose charge the horse had been, but who was not a servant of the defendant, that it had not, in fact, been hunted with the Bicester and Duke of Grafton's hounds. This information was correct. As, however, he did not buy the animal for hunting purposes, he took it away for trial the same afternoon. On the road from the defendant's premises to the plaintiff's stables, and whilst under the care of the plaintiff's servant, it took fright and seriously injured itself by running against the splinter-bar of a carriage. The plaintiff returned the horse before 5 o'clock on the Wednesday evening as not corresponding to the description, and brought this action for the price he had paid. It was not disputed that the warranty or description was a mistake, but it was contended that under the circumstances the plaintiff had no right to return the horse.

The jury, in answer to questions left them by the learned judge, found that the plaintiff was induced by the warranty to buy the horse, and that the injury sustained by the horse was not caused through any negligence or default of the plaintiff's servant. A verdict was thereupon entered for the plaintiff for for £43 1*s.*, with leave to move to enter a verdict for the defendant, or to reduce the damages to a nominal sum.

9] *A rule was afterwards obtained to enter a verdict accordingly, on the ground that the sale of the horse was not under the warranty, and that it could not be returned in the same condition as at the time of the sale; or to reduce the verdict, or for a new trial, on the ground that the plaintiff was only entitled to nominal damages, and not to the price paid by him.

Nov. 17. *Hon. G. Denman, Q.C.*, and *Willoughby*, showed cause. The plaintiff had a right under his contract to return the horse up to the Wednesday evening. Nothing occurred to

deprive him of this right. He was not bound to rescind the contract immediately on receiving information from the groom. He was entitled to take the horse away, and keep it until the time specified had expired: *Bannerman* v. *White*. (1) Secondly, with regard to the accident, that does not affect the question, as it was not owing to the plaintiff's default.

H. James, *Q.C.*, and *Henry Graham*, in support of the rule. The plaintiff, by removing the horse after the conversation with the groom, elected to treat the contract as binding in spite of the mistake in the catalogue. But if this be not so, the plaintiff was deprived of his right of return by the fact of the horse being injured whilst in his possession. If returned at all, the horse should have been returned in the same condition as when sold. The injury might have caused the horse's death, when the plaintiff would certainly have been confined to an action on the warranty. A contract cannot be rescinded unless the parties to it can be replaced in statu quo: *Curtis* v. *Hannay* (2); *Beed* v. *Blandford*(3); *Clarke* v. *Dickson* (4); *Moss* v. *Sweet* (5); *Bannerman* v. *White* (1) is not in point. There the goods were repudiated before receipt.

KELLY, C.B. I think this rule should be discharged. The action is brought to recover back the price of a horse bought by the plaintiff on Monday, the 13th of March last, under a special contract. The horse was warranted to have been hunted with the Bicester and Duke of Grafton's hounds; and the contract also *contained a condition that in case it did [10 not answer the description it was to be returned before five o'clock on the Wednesday following, "otherwise the purchaser shall be obliged to keep the lot with all faults." This clause clearly imposed on the buyer a liability to keep the horse altogether, however worthless it might be, if he should keep it beyond the time named; but, on the other hand, up to that time there was to be a power to return it, if it proved not to be according to warranty. Now it is admitted that the horse had never been hunted with the Bicester hounds, and also that it was returned before five o'clock on the Wednesday. But two

(1) 10 C. B. (N.S.) 844; 31 L. J. (C.P.), 28.
(2) 3 Esp., 82.
(3) 2 Y. & J. 278.
(4) E. B. & E. 148; 27 L. J. (Q.B.), 223.
(5) 16 Q. B. 493.

objections are raised to the plaintiff's right of return. First, it is said that he had notice before he removed the horse from the defendant's premises that the warranty had not been complied with; and, although the exact character of the communication made to the plaintiff is doubtful, there is evidence that he had learnt, before removing the animal, that it had never been hunted with the Bicester hounds. I do not think, however, that this bound the plaintiff to return it immediately. Under his contract he had till the Wednesday evening to consider whether he would keep it or not, to make further inquiries, if he thought fit, as to the truth of what he had heard, and to come to a final decision. Then, secondly, it is said that, assuming his right to return remained, he could only exercise it if the horse continued in the same condition as at the time of sale, and that, inasmuch as the horse was injured between that time and the Wednesday, the right was lost. To support this proposition several cases were cited which establish the unquestionable proposition that, as a general rule, no contract can be rescinded unless the parties can be replaced exactly in their original position. But these cases do not apply to a contract expressly stipulating for a right of return for a certain time, and on specified grounds. The case of *Curtis* v. *Hannay* (1), which was much relied on by the defendant, and which is the only one I will refer to, really has no application here. It only decides that, in a particular state of circumstances, a plaintiff may disentitle himself by his conduct from returning a specific chattel. There the plaintiff himself kept the horse which he had bought, and tried to cure it of the disease from which it was suffering

11] *and so lost the right of returning it. Indeed the injury to the horse, which took place in that case, may well have resulted from the course of treatment which was adopted. Now, in the present case, it is true that the horse was injured whilst under the plaintiff's control, but not by his default, as the jury have expressly found. In my opinion, therefore, he did not thereby lose his right of returning it, any more than if it had been attacked in the stable with some complaint which greatly lessened its value, but for the existence of which the plaintiff was not responsible. Both objections therefore fail, and the verdict should accordingly remain undisturbed.

(1) 3 Esp., 82.

BRAMWELL., B. I am of the same opinion. It is admitted here that the horse did not correspond with the warranty, and that a return would have been competent to the plaintiff unless he had done something to deprive him of his right. The defendant contends that he has been so deprived, on two grounds. First, he took the horse away, it is said, after notice that the warranty was inaccurate and thereby waived his right to object. But he had no notice when he bought the animal, and so acquired a right to take it away and keep it until the time named in the special condition. This right was not, in my opinion, affected by the information he obtained from the gossip of the owner's groom. If there had been no express clause in the contract as to the time for return, and if, after the sale, the plaintiff had received distinct notice that the warranty was a mistake, then I agree that he must have returned the horse within a reasonable time; and I think a reasonable time would be as soon as he could after the notice. Here there is an express condition, and I cannot hold that the plaintiff lost the benefit of it by the mere act of removing the horse after the conversation with the groom. Suppose the horse had already been in the plaintiff's stable when he received the notice, he would undoubtedly still have had till the Wednesday evening to consider what he would do. The fact of the notice, such as it was, preceding the actual removal, seems to me to make no difference.

But then it is said the right to return was lost, because the rule is that a buyer cannot return a specific chattel except it be in the *same state as when it was bought. That is quite [12 true as a general proposition, but in such a case as the present the rule must, in my opinion, be qualified thus:—The buyer must return the horse in the same condition as when he bought it, but subject to any of those incidents to which the horse may be liable, either from its inherent nature, or in the course of the exercise by the buyer of those rights over it which the contract gave. For example, suppose the horse, while standing in the stable, strained itself or injured a limb, that would not affect the right of return, although the horse would no longer be exactly in the same condition as before. So here, where, without the plaintiff's default, but while he was doing with the horse what he had a right to do under his contract, the horse was injured, I do not think the right to return it was lost. A contrary rule

would often produce singular results; for it must be applied to great and small accidents alike; so that a buyer might find himself deprived of his right to return a horse which was not according to warranty in consequence of any trifling hurt it might have suffered — perhaps not causing a difference of five shillings in its value — while in the buyer's possession. It appears to me, therefore, that the cases very properly cited by Mr. Graham as to the necessity, where a contract is rescinded, of the parties being capable of being replaced in their former position, must be taken with the qualification I have indicated.

No doubt, some cases which may be put by way of illustration present difficulties, but they can all be explained if the condition is borne in mind that the right to return remains, in case of alteration of condition only where that alteration is attributable either to the horse's nature or to some inevitable accident, or to some incident to which the horse was liable, while the buyer was exercising his right over it under the contract. Thus, where a buyer, who has bought a horse not warranted to jump, tries it at jumping, and so injures it, it is clear his right of return would be gone, because the accident would be his own fault. He would not be trying the horse by virtue of any right given to him under his agreement. If, however, the injury were caused by reason of a trial necessary to test the warranty the horse was sold under, then the right would 13] remain. The case of a horse dying was also put *to us. But there, if the death occurs through some natural disease, or without the purchaser's default, is he to be without a remedy? It may be answered that he might have his action on the warranty. However that might be, I am disposed to think that even in such a case the contract might still be rescinded, just in the same way as I think it could be if the horse sold were to be left at the vendor's by his permission after the sale and were to die there. In this case, therefore, I am of opinion that the plaintiff is entitled to recover, and that the rule should be discharged.

Cleasby, B. I am of the same opinion. The effect of the contract is to give the buyer an option of returning the horse in a particular event and within a specified time; and although it is clear that he might by his conduct have disentitled himself

to exercise his option, he has not, in my judgment, done anything so to disentitle himself in the present case. By taking the horse away he did no more than, under his contract, he had a right to do. Had the facts been different, a question might perhaps arise as to the effect of this removal. Suppose, for example, the defendant had given the plaintiff explicit notice before the horse was removed that the warranty was a mistake, it might perhaps then be said that by taking it away the plaintiff elected to keep it, or at all events to keep it unless it could be returned in the same condition as at the time of sale. But here there was nothing proved but a loose statement by the groom who had charge of the horse; and I think the plaintiff was still at liberty to take the horse away and to return it if, upon further inquiry, it should turn out not to be in accordance with the warranty. This being so, the second question remains, whether the right given by the contract was limited, so as only to confer a right to return the horse, provided it remained in the same condition as it was in when sold. It is a sufficient answer to say, that as a time for returning the horse was expressly fixed by the contract, an accident occurring within the time from a cause beyond the plaintiff's control ought not to deprive him of his right, provided he can return the horse in some shape or other. The case of the death of the animal purchased is different, and need not be considered now. Moreover, the matter may be put thus:— As a general rule, damage *from the depreciation of a chattel ought to fall on the [14 person who is the owner of it. Now here the effect of the contract was to vest the property in the buyer subject to a right of rescission in a particular event when it would revest in the seller. I think in such a case that the person who is eventually entitled to the property in the chattel ought to bear any loss arising from any depreciation in its value caused by an accident for which nobody is in fault. Here the defendant is the person in whom the property is revested, and he must therefore bear the loss. The cases cited seem to me to be beside the present question, for here there was an express condition in the contract itself giving to the purchaser an absolute right, under

certain circumstances, to return the horse. I think, therefore, the plaintiff is entitled to recover.

Rule discharged.

Attorneys for plaintiff: *Willoughby & Cox.*
Attorneys for defendant: *Markby & Terry.*

Where a horse was purchased with the privilege of return and escaped without negligence by the vendee, before the time fixed for a return, and was injured so no return could be made, held the purchaser was not liable. *Hunt* v. *Wyman*, 100 Mass., 198. But if the horse had been injured by the carelessness of the purchaser he could not have been returned. *Ray* v. *Thompson*, 12 Cush., 281; or if received without knowledge by the seller of the injury he could have recovered the damage sustained by the injury. *Coon* v. *Reed*, 1 Hilton, 511; see *Lord* v. *Kinney*, 13 Johns., 219. Where machinery was purchased to be retained if it worked well, it has been held that if it did not the purchaser was not liable although he did not offer to return it. *Groundsell* v. *Lamb*, 1 Mees and Welsb., 352; but this may be doubted. *McDonald* v. *Pierson*, 38 Barb., 128. If the seller accept a return he cannot object that no trial had been made. *Young* v. *Hunter*, 6 N. Y., 203. An actual trial must be made. The testimony of experts that the machinery could not have operated is inadmissible. The trial must be made within a reasonable time. *McDonald* v. *Pierson*,, 38 Barb., 128. If one borrow goods to be paid for, if damaged, if injured, the lender may sue for goods sold and delivered. *Bianchi* v. *Nash*,· 1 Mees and Welsb., 545. If goods be sold on condition that they may be returned if not satisfactory, but no time be specified, they must be returned within a *reasonable time* or the vendee may recover for goods sold and delivered. *Bailey* v. *Gouldsmith*, Peakes, N. P., 56; and see note to page 79, edition of 1820.

Dec. 2, 1871.

26] *[IN THE EXCHEQUER CHAMBER.]

CLOUGH v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Law Reports, 7 Exchequer, 26.

Fraud — Avoidance by Plea of Contract obtained by Fraud — Return of Consideration — Plea by Carrier of Fraud upon Sender of Goods.

A company sold goods, alleged to be for exportation, to one Adams, for 205*l.*, and took in payment 68*l.* in cash, and his acceptance for the residue. By his direction they forwarded the goods by the defendants' line to the plaintiff at Liverpool, who was alleged by Adams to be his shipping agent. Afterwards, having reason to suspect the solvency of Adams, they directed the defendants to stop the goods in transitu, but this message did not arrive at Liverpool until after the transitus had been determined. The defendants afterwards, at the request of

the company, returned them the goods. No act avoiding the contract on the ground of fraud was done by the company until plea in this action.

The plaintiff having brought an action against the defendants for the goods, the defendants pleaded fraud in Adams, to which the plaintiff was privy. At the trial, the jury found that Adams obtained the goods with the intention of not paying for them; that the plaintiff had advanced to Adams a sum of 250*l.* (out of which the 68*l.* was paid), but that the advance was not bona fide; and that at the time he advanced it he knew of the fraudulent intention of Adams. The judge directed a verdict for the defendants with leave to amend; and with leave to the plaintiff to enter the verdict for him for 205*l.*, if the Court should think that the defendants were not entitled to the verdict, either on the pleas as they stood, or upon any possible amendment thereof.

The Court below having made absolute a rule obtained by the plaintiff to enter a verdict for him:—

Held (reversing the judgment of the Court below), that the defendants were entitled to retain their verdict; for that an equitable plea would be good which stated that the goods had been sold to Adams and delivered by the company to the defendants for the purpose of being delivered to the plaintiff under a contract induced by the fraud of Adams, to which the plaintiff was privy; that the company, under a mistaken supposition that the transitus was still subsisting, obtained from the defendants the re-delivery of the goods to them, which was a breach of the contract between the defendants and the plaintiff; but that afterwards, and after action commenced, the company having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind the contract, and revest the property in the goods in themselves, and that this was done before any act was done by them affirming the contract, or otherwise determining their election; that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit for the purpose of obtaining in damages from the defendants on the record and the company, who were the real defendants, the value of the goods thus revested in the company.

Held, also, that, although in an action by Adams against the company it might *have been necessary in pleading a similar plea to have brought into court [27 the money paid by him to them, it was not necessary in this action either to bring the money into court, or to aver readiness and willingness to return the money, inasmuch as Adams was not a party to the action.

APPEAL from the decision of the Court of Exchequer making absolute a rule obtained by the plaintiff to enter a verdict for him.

June, 18, 19. *Quain*, *Q.C.* (*Pike* with him), for the defendants cited *Campbell* v. *Fleming* (1), *Clarke* v. *Dickson* (2), *Stevens* v. *Austin* (3), 2 Parsons on Contracts, 277, and *Belshaw* v. *Bush*.(4)

Simon, *Serjt.* (*R. G. Williams* with him) for the plaintiff, cited

(1) 1 Ad. & E. 40.
(2) E. B. & E. 148; 27 L. J. (Q.B.), 223.
(3) 1 Metc. R. 557.
(4) 11 C. B. 191; 22 L. J. (C.P.), 24.

Newnham v. *Stevenson*, (1), *Deposit & General Life Assurance Company* v. *Ayscough* (2), *Bulch-y-Plwm Lead Mining Company* v. *Baynes* (3), *Pease* v. *Gloahec*.(4)

The facts, pleadings, and arguments are fully stated in the judgment of the Court.

Cur. adv. vult.

Dec. 2. The judgment of the Court (Byles, Blackburn, Mellor, and Lush, JJ.). (5) was delivered by

MELLOR, J. This is an appeal from the judgment of the Exchequer making absolute a rule to enter the verdict for £205 in pursuance of the leave reserved at the trial.

To make the case intelligible it is desirable to call attention to the dates. The writ in the action was issued by the plaintiff Clough on the 2d of June, 1868, against the London and North Western Railway Company, who are the defendants on the record. The London Pianoforte Company, who are the parties really interested, and who have indemnified the defendants on the record, appeared in their name.

The declaration was delivered on the 30th of June, and con-
28] tained *three counts; 1st, trover; 2d, a count against the defendants as warehousemen; 3d, a count against them as carriers.

The pleas, as the record stood when the trial came on before Mr. Justice Lush, were seven in number; 1. to 1st count, not guilty; 2. to the same, not possessed; 3. to 2d and 3d counts, non-assumpsit; 4. to 2d and 3d counts, that the plaintiff did not deliver nor defendants receive the goods for the purposes alleged; 5. to the 3d count, that the goods were sold to Adams on credit; that he was insolvent, and that the vendors stopped the goods in transitu; 6. to the 3d count, that Adams, by fraud, induced the London Pianoforte Company to part with the possession of the goods, and deliver them to the defendants as carriers, to deliver them to the plaintiff as agent for Adams, and that the London Pianoforte Company, before any breach of

(1) 10 C. B. 713; 20 L. J. (C.P.), 111.
(2) 6 E. & B. 761; 26 L. J. (Q.B.), 29.
(3) Law Rep. 2 Ex., 324.
(4) Law Rep. 1 P. C., 219.
(5) Montague Smith, J., was also a member of the Court when the case was argued, but before judgment was delivered he had quitted the Court of Common Pleas upon being appointed a member of the Judicial Committee of the Privy Council.

contract by the defendants on the record, stopped the goods whilst in transitu. Lastly, 7. to the 3d count, a plea similar to the 6th, except that instead of alleging that the plaintiff was the agent of Adams, it averred that the plaintiff was privy to the fraud of Adams.

The replication took issue on all these pleas, and also replied to the 5th plea, that there was a bonâ fide assignment by Adams to the plaintiff for value.

Issue was joined on this replication.

There were also demurrers with which neither the judge at nisi prius, nor we who are now sitting as judges on an appeal, have anything to do.

Those issues came on to be tried at nisi prius before Mr. Justice Lush, on the Winter Circuit of 1868, and evidence was given, and to some extent there seems no dispute as to what was proved.

On the 18th of May, 1866, the London Pianoforte Company made a contract with Adams, by which they sold him nine pianofortes, which he stated he was purchasing for exportation, for the price in all of 205*l.* Adams paid them in cash 68*l.*, and accepted a bill at four months for 135*l.* 8*s.*, which, together with a small discount of 1*l.* 12*s.*, represented the whole price. The London Pianoforte Company gave him a receipt, and received his directions to forward the pianos by rail to R. C. Clough, Temple Court, Liverpool, who, Adams stated, was his shipping agent.

The London Pianoforte Company sent them accordingly by the *London and North Western Railway Company, ad- [29 dressed as directed, and they arrived at Liverpool. Clough was not found at the address given, and the London and North Western Railway Company, on the 21st of May, wrote to the London Pianoforte Company, stating that this was the fact, and requesting their directions. Almost at the same time the London Pianoforte Company received information that Adams was a bankrupt; they at 9.30 A.M. on the 22d of May, sent directions to the London and North Western Railway Company in London to stop the goods in transitu; but the London and North Western Railway Company did not forward this notice to Liverpool by telegraph, and before this intimation arrived at Liverpool by train, Clough, the now plaintiff, had called at the

Liverpool station of the London and North Western Railway Company, and enough took place between him and the London and North Western Railway Company to put an end to the transitus, the London and North Western Railway Company agreeing with him to hold the goods no longer as carriers, but as warehousemen, for him.

The London Pianoforte Company, nevertheless, required the London and North Western Railway Company to send the pianos back to London to them, and the London and North Western Railway Company, on receiving an indemnity from them, did so.

The London Pianoforte Company, on the 23d of May, wrote to Adams, informing him that Clough had not been found at his address, and telling him that they had in the mean time ordered the pianos back until they heard from him.

On the 27th of May, the plaintiff demanded the pianos from the London and North Western Railway Company, and heard that they had been returned to the London Pianoforte Company. On the 2d of June the plaintiff Clough issued the writ against the London and North Western Railway Company.

Up to this time it is clear, as a matter of fact, that the London Pianoforte Company were treating the contract as an existing one, and were relying on their right to stop in transitu; but there is nothing whatever to show that they were as yet aware that the contract was one which had been induced by fraud, so as to give them a right to avoid it on that ground.

But at the trial they succeeded, on the cross-examination of
30] *Clough and Adams, in making out a strong case to go to the jury that Adams, who had just been discharged from prison as a bankrupt suing in formâ pauperis, went to London with the plaintiff on a concerted plan to obtain the pianos without paying for them, in order that Clough might sell them by auction and obtain the proceeds, and that the 68*l.* was in fact Clough's money, advanced for the purpose of carrying out the fraud, and that a document given in evidence, by which Adams acknowledged to have received 250*l.* as an advance on the pianos, was a part of the fraud.

The pleas as to stoppage in transitu were not abandoned by the defendants, but insisted upon. Mr. Justice Lush most properly ruled that the evidence showed that the transitus was ended before the stoppage.

The case then goes on to state as follows :—"The plaintiff's counsel then took the objection that the 7th plea, which set up the plaintiff's privity with Adams' Fraud, was pleaded to the 3d count of the declaration, which was against the defendants as carriers, and that there was no similar plea to the 2d count, which was against the defendants as warehousemen."

The defendants' counsel asked leave to amend, which was granted, Mr. Justice Lush holding that it raised no new question, but merely set the pleas right to raise the question which the parties came to try, and that such amendment was necessary to raise the real question at issue between the parties.

Mr. Justice Lush left three questions to the jury, viz. : — 1. Did Adams obtain the goods with the intention of not paying for them? 2. Did Clough in fact advance the 250*l.*? Did he at the time he advanced it know of the frandulent intentions of Adams?

The jury answered the above questions as follows :— To the first: He did. To the second: He did, but not bonâ fide. To the third: Yes.

Upon these findings a discussion followed with respect to the pleadings; and ultimately Mr. Justice Lush directed that the verdict should be entered for the defendants, the pleadings to be taken as amended; but if the Court should think that the defendants were not entitled to the verdict, either upon the pleas as they stood, or *upon any possible amendment* thereof, then the verdict to be entered for the plaintiff for 205*l.*

*It is stated in the case that the bill and the 68*l.* re- [31 mained, and still remain, in the possession of the London Pianoforte Company. Adams never demanded the return of either, nor did the Pianoforte Company ever offer to return them. It is to be observed that neither in the pleas, as they stood before the leave to amend was given, is there any averment that the defendants were ready and willing to restore the 68*l.*, nor in the replication is there any averment that the defendants still retained the money, though Adams claimed it. And we learn from Mr. Justice Lush that nothing whatever was said by either party, either on the examination of their witnesses, or in their addresses to the jury, on this point, or he would certainly have taken the opinion of the jury on it.

There can be no doubt, as Adams was there present giving

evidence in favor of the plaintiff, and endeavoring to support the fraud, the jury, if asked, must have found at least that neither he nor the plaintiff was ever ready to receive back the money and bill, and thereby admit that the contract was fraudulent and voidable on that ground.

No distinct evidence was given as to when the London Pianoforte Company first became aware that the plaintiff was privy to the fraud. They clearly had enough information to lead them to assert it at the time when they pleaded the last plea; but probably, as Mr. Quain said, they had not more than suspicion till the plaintiff was cross-examined. No suggestion was made as to the importance of the date of their knowledge, and no question was asked of the jury on that head.

We think that we must construe the reservation as meaning that the plaintiff was not to have the verdict entered for him, if on these facts and findings there was any defence which might have been made the subject of a good plea, either on legal or on equitable grounds. If there was evidence of any such defence, but the opinion of the jury was not taken on some material point when it ought to have been, it may entitle the plaintiff to a new trial, but not to have the verdict entered for him.

The last plea actually pleaded on the record to the 3d count only, and which was most properly amended by applying it to all the counts, was not proved, inasmuch as it averred that the discovery of the fraud was *before any breach of contract* by the de-
32] fendants *on the record, whilst, in fact, the evidence proved that it was after a breach of contract by them, and probably after the action was commenced. It certainly was before the case went to the jury. And the pleas which the defendants have since the trial delivered, are subject to the same defect. But on the reservation the plaintiff is not to have the verdict entered for him if "upon any possible amendment of the pleas," the defendants would be entitled to the verdict. And we think that a plea might be framed, stating that the goods had been sold to Adams, and delivered by the London Pianoforte Company to the railway company, for the purpose of being delivered to the plaintiff under a contract induced by the fraud of Adams, to which the plaintiff was privy; that the London Pianoforte Company, under a mistaken supposition that the transitus was still subsisting, obtained, from the railway company the re-

delivery of the goods to them, which was a breach of the contract between the railway company and the plaintiff; but that afterwards, and after action commenced, the London Pianoforte Company having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind the contract, and revest the property in the goods in themselves, and that this was done before any act was done by them affirming the contract or otherwise determining their election; and that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit with the purpose of obtaining in damages, from the defendants on the record and the London Pianoforte Company, who were the real defendants, the value of the goods thus revested in the London Pianoforte Company.

Such a plea, we think, would have been proved, and would have furnished a complete answer, probably at law, but it is enough now to determine that it would have been good on equitable grounds.

This is contrary to the judgments in the Court below, and it is proper to point out what they seem to consider the fatal defects in such a plea, and then to render the reasons that make us think those not fatal.

The Chief Baron seems to have his judgment on the principle that it was necessary that there should be an averment in the plea, *and proof at the trial, of some communication to the [33 plaintiff showing that the London Pianoforte Company had elected to rescind the contract before the commencement of the action. The three other judges do not seem to put it on that ground; but they all agree with the Chief Baron in thinking that it was essential that the London Pianoforte Company should do some act, before and independent of delivering a plea, indicating their intention to avoid the contract; and that this act should be accompanied by an offer, or at least an expression of their readiness and willingness, to hand over the 68*l.* and the acceptance which they had received on the footing that the contract was valid, and which they had no right to retain after the contract was avoided.

These objections, if good, would certainly apply to the plea we have supposed, whether it was pleaded at law or on equitable grounds. There is a further objection to the plea as a plea

at law, that the rescission came after the plaintiff had a vested cause of action against the London and North Western Railway Company, and that it could not operate to defeat that vested cause of action by relation. If it were necessary to decide this, we should have to say whether we would follow the opinion expressed in the end of the judgment of the Exchequer Chamber in *Stevenson* v. *Newnham* (1), delivered by Parke, B., from which Erle, J., dissented, or the equally strong opinion expressed by Cresswell, J., in *Young* v. *Billiter* (2), apparently concurred in by the majority of the Exchequer Chamber in that case.

It is not necessary to form any judgment as to this controverted point, for it is clear that as a court of equity interferes on the principle of granting relief to the defrauded party, from whom the fraudulent party against conscience seeks to obtain the fruits of his fraud, no such point could arise on a plea pleaded upon equitable grounds, and as the leave is reserved, it is enough if a good plea on equitable grounds could have been pleaded.

It is also to be observed, that the supposed plea, being of a matter that occurred after action brought, the plaintiff might have confessed its truth and taken judgment for his costs up to the time of plea pleaded. But it is obvious here, that the 34] plaintiff *never would have confessed it and acknowledged his fraud. He must be considered as having taken issue on it.

We now proceed to examine the grounds on which we understand the judges in the court below proceeded; and to give our reasons for coming to a different conclusion. We agree completely with what is stated by all the judges below, that the property in the goods passed from the London Pianoforte Company to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. This was not controverted at the bar, and it is not necessary to cite authorities for it.

And we further agree that the contract continues valid till the

(1) 13 C. B., at p. 303; 22 L. J. (C. P.), at p. 115.

(2) 6 E. & B., at p. 33; 25 L. J. (Q. B.), at p. 181.

party defrauded has determined his election by avoiding it. And, as is stated in Com. Dig. Election, C. 2, if a man once determines his election it shall be determined forever; and, as is also stated in Com. Dig. Election, C. 1, the determination of a man's election shall be made by express words or by act. And, consequently, we agree with what seems to be the opinion of all the judges below, that if it can be shown that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined forever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract. The principle is precisely the same as that on which it is held that the landlord may elect to avoid a lease and bring ejectment, when his tenant has committed a forfeiture. If with knowledge of the forfeiture, by the receipt of rent or other unequivocal act, he shows his intention to treat the lease as subsisting, he has determined his election forever, and can no longer avoid the lease. On the other hand, if by bringing ejectment he unequivocally shows his intention to treat the lease as void, he has determined his election, and cannot afterwards waive the forfeiture: *Jones* v. *Carter* (1). We cannot do better than to cite the language of *Bramwell, B., in *Croft* v. *Lumley* (2), [35 which precisely expresses what we mean. He says, "The common expression 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. When a lessee commits a breach of covenant on which the lessor has a right of re-entry, he may elect to avoid or not avoid the lease, and he may do so by deed or by word; if, with notice, he says, under circumstances which bind him, that he will not avoid the lease, or he does an act inconsistent with his avoiding, as distraining for rent (not under the statute of Anne), or demanding subsequent rent, he elects not to avoid the lease; but if he says he will avoid, and does an act inconsistent with its continuance, as bringing ejectment, he elects to avoid it. In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election?"

(1) 15 M. & W., 718. (2) 6 H. L. C., at p. 705; 27 L. J. (Q. B.), at p. 330.

In all this we agree, and think that, mutatis mutandis, it is applicable to the election to avoid a contract for fraud.

In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election?

We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.

And lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined. But we cannot see any principle, and are not aware of any authority, for saying that the mere fact that one who is a party to the fraud has issued a writ and commenced an action before the rescission, is such a change of position as would preclude the defrauded party from exercising his election to rescind.

Neither can we see the principle or discover the authority for 36] *saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea.

It seems to us clear, on principle, that a statement in a plea by the party from whom the property passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination of his election to avoid the transaction as could well be made. Of course, if he had already determined his election the other way, or if such things had happened as precluded him from rescinding, the plea would have no effect; but after succeeding by means of such a plea, the person pleading it could never successfully set up the contract as still valid, either against the plaintiff in the action in which the plea was pleaded or any one else. He would have, both by act and by word, determined his election for ever according to the doctrine laid down in Com. Dig. Election, C. 1, 2. And no authority was cited on the argument, nor are we aware of any, for saying that this unequivocal ex-

pression of his determination of his election must be preceded by some act in pais. *Newnham* v. *Stevenson* (1), was much relied on by the plaintiff's counsel, but in reality decides nothing as to this point. The plaintiff there had obtained goods under a conveyance from one Saunders, made by him voluntarily and in contemplation of bankruptcy; and whilst they were in his possession and were his property, and before Saunders had become a bankrupt, the defendants wrongfully distrained on them. The Court of Common Pleas in their judgment say, "By a transfer which is a fraudulent preference the property vests in the transferee, subject to be divested by the assignees at their election, and the title of the transferee is perfect except so far as it is avoided by the assignees." So far this is unquestioned law. The Court then proceeds to deal with the evidence in the case before them: "The assignees in this case were not proved to have done anything to affect the plaintiff's title. They had not demanded the goods of the plaintiff. They had not even ratified the defendant's act. And the commencement of an action in trover, which may be abandoned at any time, and which assumes that the goods came into the possession of the defendant lawfully, cannot without more be taken to be an election on the part of the assignees *to avoid the transfer." It is [37 upon this latter sentence that Serjt. Simon relied; but we think it does not at all express an opinion that no statement, however explicit, on the record could amount to a determination of the election.

It is, however, quite true that no man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it; and therefore the London Pianoforte Company, on rescinding the contract, were bound to restore to Adams the money and the acceptance which they had obtained from him. Probably a Court of equity, if applied to for an injunction to prevent the plaintiff from continuing the action, would have made it a condition that the defendants should do equity by paying to the plaintiff whatever the plaintiff had paid to them under the contract; and probably, from analogy thereto, a Court of law would require the party pleading a plea of this sort to bring

(1) 10 C. B., 713; 20 L. J. (C. P.), 111.

into court any money which the plaintiff had paid to them. It is not necessary to determine how that may be, for Adams was no party to this action, and the defendants could not be required, in this action between the plaintiff and themselves, to bring into court money which, in consequence of the rescission of the contract, they held for the use of Adams.

It may be that Adams in fact was only agent for the plaintiff, and that the money really belonged to the plaintiff; but that was not known to the defendants; and it does not lie in the plaintiff's mouth to object to the defendants' plea on the ground that they had not discovered the whole of his fraud.

Neither does it lie in the plaintiff's mouth to object to the plea because it does not contain a statement that they were ready and willing to return to Adams the money he had paid them; that being a matter affecting the rights of a stranger to the suit, but in no way affecting the rights of the plaintiff.

If, indeed, it could have been shown that the bill had been negotiated so as to put it out of the power of the London Pianoforte Company to return it; or, still more, if it had been the fact that Adams was willing to receive back the money, and that they had refused, there would have been ground for saying that they had already determined their election by affirming the 38] contract; *but nothing of the kind existed in fact. The only ground on which the jury could have been asked to find that the London Pianoforte Company had affirmed the contract was, that they pleaded and relied on a plea of stoppage in transitu, which, if they could have proved it, would have entitled them to resume their vendor's lien for the unpaid balance of the price, without parting with the cash, and which was therefore so far inconsistent with a plea of rescission for fraud, the legal consequence of which would be that they could not retain the money.

But different and quite inconsistent defences may be and are raised every day in distinct pleas; and though the jury might perhaps have been asked, on this, to find that there had been an affirmance of the contract by holding to the money, it was the plaintiff's business to raise the point at the trial, and ask that it should be submitted to the jury. Probably, if the point was present to the minds of the plaintiff's counsel at the time of the trial, they abstained from raising it from a well-founded

belief that the jury would have found nothing in favor of the plaintiff which they could reasonably find against him. Having abstained from raising it then, it is too late to do so now.

We think, therefore, that the plaintiff is not entitled to a new trial in order to have this point left to a jury. And as we think that the facts proved did constitute a defence, we think the rule should not have been made absolute, and that we should now discharge it, leaving the verdict to stand for the defendants.

Judgment reversed.

Attorneys for plaintiff: *Gregory & Co.*
Attorneys for defendants: *Pike & Son.*

END OF MICHAELMAS TERM, 1871.

*CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

January 17, 1872.

39] HARRISON v. THE BANK OF AUSTRALASIA.

Law Reports, 7 Exchequer, 39.

Ship — Shipping — General Average — Spars used for fuel.

The plaintiff's ship sailed from Melbourne for London, having on board (as is usual with sailing vessels on this voyage) a donkey-engine, which was equivalent to ten additional men, and without which (or the ten additional men) she would not have been seaworthy. The engine was used for pumping and also for other ship's purposes. The ship had on board a sufficient stock of coals for an ordinary voyage, and was expressly found to be seaworthy. On the 10th of March she encountered bad weather, which continued till the 1st of April, and then moderated. During this time she strained, and made much water, and she continued afterwards to leak; the water could only be kept under by pumping, and for this purpose it was necessary to use the engine; without which she could not have been kept afloat.

On the 16th of April the stock of coals was reduced to one and a half tons, and the captain, in order to obtain fuel, directed some spare spars and wood, which were part of the ship's stores, to be cut up to burn with the coal; wood alone would not have sufficed to get up the steam. On the 5th of May the ship obtained some coal from a passing vessel, and on the 16th put into port to obtain a further supply. On arriving in the Thames the engine broke down from overwork.

The ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine.

40] *The plaintiff claimed from the defendants, who were owners of cargo, a general average contribution in respect of, 1. The spars and wood; 2. The extra coal; and, 3. The injury to the donkey-engine:—

Held, by Kelly, C.B., and Bramwell, B., that the facts showed an imminent peril requiring the sacrifice of the spars and wood, and that the plaintiff was therefore entitled to a general average contribution in respect of them; but that he was not so entitled in respect of the coal or the injury to the donkey-engine.

By Martin and Cleasby, BB., that no such emergency had occurred as to entitle the plaintiff to a general average contribution in respect of any of the above matters.

THIS was an action brought to recover the sum of 95*l.* 8*s.* 10*d.*, as a contribution in general average. The defendants paid 51*l.* 6*s.* into court, and the plaintiff denied that that sum was sufficient to satisfy the plaintiff's claim.

The action came on for trial at Guildhall on the 7th of July, 1869, before Kelly, C.B.; and a verdict was then entered for the plaintiff, subject to a special case, to be settled by an arbitrator, which stated as follows:—

In February, 1868, the defendants, who are bankers at Melbourne, in Australia, and in London, shipped on board the British sailing ship, *Champion of the Seas*, then lying at Melbourne, of which the plaintiff was owner, four boxes of gold to be conveyed to London.

5. The ship sailed on the 29th of February, being in every respect properly fitted and manned for the voyage, and having on board a sufficient quantity of coals for an ordinary voyage. (1)

6. The ship was furnished with a donkey-engine of eight-horse power, which was adapted for loading and discharging cargo, for hoisting sails and taking them in, and for pumping the ship. It was, according to the evidence of the captain, equivalent for the purpose of working the ship during the voyage to a crew of ten men; and, had the engine not been on board, the vessel would have required an additional crew of that number.

7. From the saving of labor and the reduction of the number of the crew effected by the use of a donkey-engine, it is sometimes called a steam crane.

8. It is usual for such a ship as the *Champion of the Seas*, on *the voyage from Melbourne to England, to be furnished [41 with a donkey-engine, which is used for pumping the ship when necessary.

9. From the 29th of February to the 10th of March, the ship

(1) In the course of the argument, in answer to a question by the Court on this point, the arbitrator stated that the ship was sea-worthy.

experienced ordinary weather, and whatever pumping was necessary was done by the crew. On the 10th of March the ship encountered a severe cyclone followed by very bad weather, which caused her to strain and make much water. The water in the hold at times increased to five feet, and could only be kept down by constant pumping. At first the pumping was done by the engine during the day, and by the crew during the night; but it afterwards became necessary to keep the donkey-engine pumping constantly. With the donkey-engine the pumps were got to suck now and then.

10. After the 1st of April the weather moderated, but the vessel continued to leak; and about the 16th of April the supply of coals was reduced to about one and a half tons, from the constant working of the engine. It was necessary to keep the engine at work, and the captain, after consultation with the first and second officers, in order to obtain fuel, directed that some spare spars and wood which were part of the ship's stores and not intended to be used as fuel, should be cut up to use with the coal.

10A. There was no sudden emergency which rendered the cutting up of the spars and wood necessary; but it would have been impossible to have kept the ship afloat with the crew alone without working the donkey-engine.

11. Wood alone would not have sufficed to get up the steam necessary to work the engine; and the captain acted prudently and judiciously for the preservation of the ship and cargo in obtaining fuel by cutting up the spars and wood to use with the coals.

12. The fuel so produced was not sufficient to keep the engine at full work, and notwithstanding the efforts of the crew, who were occasionally assisted by some passengers in working the pumps, the water in the hold slowly increased.

13. On the 25th of April it was discovered that a butt under the port fore-channels, and six or seven feet below the water-line, had been started; whereupon the master of the ship lowered a boat and stopped it with grease, and on the 27th caused 42] a stage to be *rigged, and by means of wedges and plugs succeeded in partially stopping the leak.

14. On the 5th of May the ship fell in with the bark *Peru*, and obtained from her thirty-three bags of coals; with this sup-

ply the engine was put to full work, and the water in the hold greatly reduced.

15. In order to procure a further supply of coals, the master determined to run into the port of Pernambuco, and the ship anchored at Pernambuco, on the morning of the 16th of May.

16. The ship could not have been repaired at Pernambuco, and the captain having obtained a large supply of coals, viz., thirty tons, proceeded on the voyage. The captain in so doing acted prudently. The ship was exposed to no serious risk from the water she made, while there was sufficient fuel on board to work the donkey-engine.

17. The vessel continued to leak during the remainder of the voyage, and it was necessary to keep the engine constantly at work at the pump. When she arrived in the Thames the coals had been exhausted. Without the aid of the donkey-engine the vessel could not have continued the voyage.

18. The ship arrived at her place of discharge in the docks on the 6th of July. The engine broke down while she was coming up the river. The injury to the engine was the result of wear and tear from the constant working during the voyage.

The question for the opinion of the Court was, whether the cost of the coals purchased from the *Peru* and at Pernambuco, or the cutting up of spars and ship's materials for fuel for the donkey-engine, and the cost of the repairs of the donkey-engine, could be charged to general average, and recovered from the defendants.

If the Court should be of opinion in the affirmative, the case was to be referred back to the arbitrator to ascertain if the amount paid into court was or was not sufficient to cover the plaintiff's claim against the defendants. And if he should find that such sum was not sufficient, then judgment was to be entered for the plaintiff for the deficiency, together with costs of suit.

If the court should be of opinion that none of the said items could be charged to general average, then the judgment was to be entered for the defendants, together with costs of suit.

*April 28; May 31. (1) *Henry James, Q.C.* (*Cohen* with him), for the plaintiff. First, the plaintiff claims general ave- [43

(1) The case was twice argued, on the 28th of April, before Martin and Bramwell, BB., and on the 31st of May before the full Court.

rage in respect of the spars and wood used as fuel to drive the donkey-engine. This expenditure answers to the description given by Blackburn, J., in *Wilson* v. *Bank of Victoria* (1); it is "expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature;" it is also within Lord Kenyon's words in *Birkley* v. *Presgrave* (2), "All those articles which are made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern;" and those of Lawrence, J., in the same case (3), "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo;" see also *Plummer* v. *Wildman* (4). This language agrees with the statements of text writers, both English and American: 2 Arn. on Mar. Ins. (3d ed.), pp. 773, 780; Machlachlan on Shipping, p. 570; 2 Phil. on Mar. Ins. (3d ed.), 83, p. 78, (ss. 1299, 1300). And the practice and opinion of average-staters is in conformity with it: Stevens on Average, p. 75; Bailey on Average, pp. 16, 17, 28, 99. The general principle which these authorities establish is, that any extraordinary sacrifice voluntarily and properly incurred for the common benefit of all, and to preserve ship and cargo from destruction, is matter for general average. Therefore, if the circumstances were such that without that sacrifice destruction was reasonably to be apprehended; or, in other words, if it would appear a necessary act to a reasonable and prudent man, it is matter for general average, notwithstanding there may have been no sudden emergency threatening immediate destruction. "The moment of the greatest distress cannot be waited for:" Benecke, p. 171. The plaintiff's claim answers these conditions. The necessity of the occasion is undeniable (see parr. 10–13); it was reasonably to be expected, and the result would in fact have been, that if the coals then remaining had been used up, the ship must have gone to the bottom. And 44] it is equally clear *that the purpose to which the spars were applied was extraordinary. If the rudder being swept away, a spare mast were cut up to rig up a new one, this would be matter for general average: see 2 Arn. on Mar. Ins. (3d ed.), p. 782; and the employment of spars to feed the fire is equally

(1) Law Rep. 2 Q. B., at p. 213.
(2) 1 East, at p. 227.
(3) 1 East, at p. 228.
(4) 3 M. & S. 482.

a diversion of them from their proper use, and therefore an outlay extraordinary in its character. The case may be tested by supposing that it became necessary to apply to this purpose timber forming part of the cargo; the master would clearly be entitled in such a case as the present to use the timber in that way, and the owner would equally be entitled to claim for general average; the shipowner sacrificing his own goods is in no different position, unless it can be shown that the necessity for their use arose from some fault on his part. But it is here found as a fact, that when the vessel sailed she had an adequate supply of coals; the necessity, therefore, was one not to be foreseen, and which supervened in consequence of an unexpected and extraordinary peril.

Secondly, the plaintiff also claims in respect of the extra quantity of coals purchased for the donkey-engine. It is like the case of extra hands hired to pump, which would be allowed: *Wilson* v. *Bank of Victoria*. (1) The purpose was, "to preserve more subjects than one exposed to a common jeopardy;" and "an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for the purpose, money's worth were thrown away:" Blackburn, J., in *Kemp* v. *Halliday*.(2)

Thirdly, the injury to the donkey-engine was also the result of an extraordinary use of it in the preservation of ship and cargo; but this part of the plaintiff's claim, it must be admitted, is weaker than the rest. [He also cited *Lyon* v. *Mells* (3), *Grill General Iron Screw Collier Co.*(4), *Farnworth* v. *Hyde* (5), *Taylor* v. *Curtis*.(6)]

Pollock, Q.C. (*Lodge* with him), for the defendants. The opinions of average-staters, whose customs vary at different ports, are no evidence of the law on general average. Neither can American *authorities be relied on, for it is well known [45 that the American law goes further than the English in allowing contribution for general average: 1 Parsons on Shipping, p. 538 (n.); *Walthew* v. *Mavrojani* (7). The last cited case also shows that *Plummer* v. *Wildman* (8) must be taken as limited by

(1) Law Rep. 2 Q. B., at p. 213.
(2) 6 B. & S., at p. 746; 34 L.J. (Q.B.), at p. 242.
(3) 5 East, 428.
(4) Law Rep., 1 C. P., 600.
(5) 18 C. B. (N.S.), 835; 34 L. J. (C.P.), 207.
(6) 6 Taunt, 608.
(7) Law Rep., 5 Ex., 116.
(8) 3 M. & S., 482.

Power v. *Whitmore* (1), as had been before explained in *Hallet* v. *Wigram* (2); and what is said in *Birkley* v. *Presgrave* (3) must be taken with reference to these later decisions; indeed the point actually decided in that case was only that an action would lie for general average contribution, and there was no intention to lay down any rule as to what would give rise to such a claim. *Plummer* v. *Wildman* (4), however, does not assist the plaintiff, for it only allows the costs of going into a port to repair damage which is the result of a general average sacrifice; and assuming such a sacrifice to have been made, the necessary consequence of it may very well be treated as part of the sacrifice itself. But here the whole question turns on whether there has been a voluntary sacrifice under such circumstances as to make it general average. The statements in the case show that there has not. The circumstances must be such as will justify a jettison, which cannot be where the necessity is caused by the shipowner's default (1 Parsons on Shipping, p. 411). Here the donkey-engine was equivalent to ten men; and, but for it, the ship would have been undermanned, and, therefore, unseaworthy: *Clifford* v. *Hunter* (5). But as the efficiency of the engine depends on there being sufficient fuel to keep it at work, the ship without sufficient fuel is as though it had neither the ten men nor any substitute for them, and the fault of the master in not having enough coal cannot entitle him to general average for burning spars. It is the shipowner's duty "to provide and do all that belongs to the proper navigation of the ship" (1 Parsons on Shipping, p. 382); and what has been done here has not gone beyond this duty. Again, there must be a sudden emergency, creating a peril which cannot be otherwise provided against. Here there was none such: see parr. 10 a. and 16.

The case is still clearer with respect to the extra coal; no 46] *distinction can be drawn between purchasing a fresh supply of coal and using coal already on board; carried, for instance, to supply a coaling station; and it cannot be contended that the latter would have been the subject of general average. *Wilson* v. *Bank of Victoria* (6) is directly against this claim. As to the claim for the donkey-engine, it would be as reasonable to claim

(1) 4 M. & S., 141.
(2) 9 C. B., 580.
(3) 1 East, 220.
(4) 3 M. & S., 482.
(5) Mood & M., 103
(6) Law Rep., 2 Q. B., 263.

the cost of repairs in general, which notoriously falls on the shipowner.

Cohen in reply. It is expressly found that the supply of coals was adequate, and that the ship was seaworthy; no fault, therefore, can be imputed to the shipowner (1), and the question turns only on whether the peril was of such a nature as to give rise to a claim for general average. It clearly was, unless it is essential that there should be an imminent peril of immediate destruction. But this is not the test, as is shown by the instances where expenses incurred on account of ship and cargo, safe in port, but waiting for a convoy, or delayed by proceedings necessary to redeem the whole adventure from capture, are allowed as general average. There was here a moral certainty of total loss unless the measures actually taken were resorted to; for no change of circumstances could reasonably be anticipated which would have the effect of preventing it, and this is all that is required.

Cur. adv. vult.

Jan. 17. The Court being divided in opinion, the following judgments were delivered:—

MARTIN, B. This is an action in which the question is, whether the plaintiff is entitled to recover a sum of about 40*l.* for general average; and although the amount in dispute is not large, the question involves a matter of very great importance to the mercantile and shipping interests of this country.

The facts have been stated by an arbitrator in a special case. The first four paragraphs state the plaintiff is the owner of a ship called the *Champion of the Seas*, which in February, 1868, was at Melbourne, bound on a voyage to London, and that the defendants shipped on board four boxes of gold, for which the master signed the ordinary bill of lading.

The bill of lading is not set out, but it would state that the *defendants had shipped on board the four boxes of gold to [47 be carried from Melbourne to London, and there delivered to the consignee upon payment of a certain ascertained sum for freight, unless prevented by the perils mentioned in the bill of lading. This is the only contract between the plaintiff and defendants, and it is clear that if the *Champion of the Seas* was the veriest

(1) See ante, p. 40, n.

sculk which ever sailed, and if she departed from Melbourne only half manned and utterly unseaworthy, nevertheless, if she had arrived in London, and the four boxes of gold had been there delivered to the consignee, the plaintiff would have performed his contract, and would be entitled to his freight. The defendants would have no legal ground of complaint that the ship was half rotten, that she was half manned, that instead of sailors she had a donkey-engine and a quantity of fuel utterly insufficient to work it for the voyage. The answer of the shipowner would be, "Your four boxes of gold have been safely delivered to you in London. I have performed my contract. The manner in which I have performed is my business, not yours."

The real question in the present case is, whether the shipper (the merchant) is bound by law to pay to the shipowner, for the performance of the service contracted for in the bill of lading, a sum of money beyond that stipulated for in the written contract between the parties. [The learned judge here stated the effect of paragraphs 5–14 and the claims made by the plaintiff, stating the claim as to the donkey-engine to have been abandoned, and proceeded.] The question is, whether either of the above claims is general average, and I am of opinion that neither of them is. It seems, in reason, highly unjust that the merchant should be called upon to pay the two sums claimed. He had contracted with the shipowner to pay him a certain sum for the conveyance of his four boxes of gold from Melbourne to London. The shipowner was to provide the ship and seamen to perform the service, and he thought fit, instead of hiring ten additional men, to have a steam-engine, which, in order to its being of any use, necessarily required fuel. He did provide at Melbourne what he reasonably deemed sufficient, but it turned out he was in error, and that the supply was not sufficient. How, in reason, does this relieve him from the obligation of doing his best to 48] remedy the short supply, and cast upon the *merchant the obligation of contributing to the loss and expense which he incurred in consequence? There is no doubt, however, that long-continued custom has created the claim called "general average." This subject is treated in the 1st chapter of the 6th part of Abbott on Shipping, 11th ed., p. 521. It is said by Lord Tenterden to be founded on the "Lex Rhodia de Jactu," or, in

other words, the law of jettison, which is, that if for the sake of lightening the ship a jettison (jactura) is made of merchandise, that which is sacrificed for all should be made good by the contribution of all. His lordship comments upon it, and proceeds to state its true principle; that there must be a voluntary sacrifice for the good of all, and made at a moment of imminent danger, which he instances by the ship being in danger of perishing by a hurricane, or by the quantity of water that may have found its way into it, or by laboring upon a rock or a shallow upon which it may have been driven by a tempest, or when a pirate or enemy pursues, gains ground, and is ready to overtake; the loss arising from throwing merchandise overboard under such circumstances is to be made good by general average. He then proceeds to discuss cases, in which, in analogy of the law of jettison, general average has been allowed; and as it seems to me, is rather disposed to think they have gone too far. The subject is discussed at great length by the learned editor in the notes, and I think he has, at the conclusion of note (n), p. 537, expressed the true rule, viz., that to make expenses incurred by the shipowner general average, they must be expenses voluntarily and successfully incurred, or the necessary consequence of a resolution voluntarily and successfully taken by a person in charge of a sea adventure, for the safety of ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them. In my opinion, in the present case there was no imminent danger of total loss when the spars and wood were cut up and burnt. The weather had moderated for the sixteen days previous, there was a ton and a half of coal remaining, which it was proper to husband, and the spars and wood were used to burn with the coal. There could clearly have been no jettison at the time, and, in my opinion, the shipowner must bear the loss of his timber being made use of to aid in making up for the deficient coal. For the same reason, I think the price of the coal *bought on the 5th of May is not [49 general average, and must be borne by the shipowner. In my opinion there was no present immediate peril imminent. The cases relied on on behalf of the plaintiff were *Birkley* v. *Presgrave* (1), and *Plummer* v. *Wildman* (2); these cases were said by the learned counsel for the defendants to be, although perhaps

(1) 1 East, 220. (2) 3 M. & S., 482.

apparently in favor of the plaintiff, yet in reality not so; and he relied on *Power* v. *Whitmore* (1); *Hallett* v. *Wigram* (2), and *Wilson* v. *Bank of Victoria* (3). In my opinion, the two cases last mentioned were correctly decided, and are accurate exponents of the law. In Mr. Arnould's book it is said (vol. ii, 3d ed., p. 782), that where a rudder had been carried away and a spare spar was got up to make one, it was decided to be general average. The circumstances of the case are not stated. I think the question in the present case is one of fact, and that the case does not show that at the time when the spars and wood were cut up to add to the coal, or at the time when the coal was bought from the bark, there was such imminent danger of the ship's sinking that the loss and expenses incurred by the shipowner ought to be contributed to by the merchant.

I think that in reason, and in accordance with his contract, he ought to bear the loss and expense himself.

This judgment was read by

CLEASBY, B., who then added:—

I have read the judgment which my Brother Martin has written, and I agree in that judgment.

I will only add two remarks. First: I think the statement in the case does not afford sufficient materials for the conclusion that any sacrifice was made at a time of imminent danger. The captain would not have been justified in making a jettison of a portion of the cargo to diminish the leak, and so lessen the necessity for continuous use of the donkey. It was a proper and prudent thing in the captain to guard against the supply of fuel failing, and the possibility of his being unable to get a further supply in time. But this prudence is not sufficient to justify a 50] jettison or any other *sacrifice, so as to lay a foundation for general average. It does not appear upon the case how long the coal would have lasted after the 16th of April, when the captain began to use the spars; nor how much remained at the time when the fresh supply was obtained; but it does appear the spars were only used to eke out the coal, and that they lasted from the 16th of April to the 5th of May.

The danger in reality was not of going to the bottom if no-

(1) 4 M. & S., 141.
(2) 9 C. B., 580.
(3) Law Rep. 2 Q. B., 203.

thing was done, but the improbability of meeting with a supply of fuel during the interval while the existing fuel was being consumed. And it appears to me that this not only is insufficient to establish such a case of imminent peril as is necessary to found a claim to general average, but negatives it.

The other remark is, that some difficulty is created in this case by referring to American authorities on this subject, and to Stevens on Average, and other works of a similar nature. The law in America does not in all respects agree with ours on the subject of general average (as will be pointed out shortly), and the other works referred to do not, in my opinion, correctly state the English law on the subject. We were pressed with many authorities to show that imminency of danger was not necessary to make the expenses incurred by a vessel in going into port to repair a subject of general average. It is undoubted that when some sacrifice has been made (for example, cutting away masts, &c.), the expenses consequent upon going into port after the danger is over to repair this loss are in England the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself. But the expenses attending the going into port to repair sea damage caused by a storm when no sacrifice has been voluntarily made, do not, it is submitted, form items of general average according to English law, although they are regarded as doing so in America: 3 Kent's Commentaries (10th ed.), p. 329, and note. The distinction is clearly pointed out in the judgment in *Power* v. *Whitmore* (1). The case of *Plummer* v. *Wildman* (2), relied upon by the plaintiff, might appear to countenance the opinion *that [51 the expenses consequent upon putting into port to repair sea damage for the benefit of all, went into general average; but that case must always be taken with the explanation given by Lord Ellenborough in *Power* v. *Whitmore* (3), in the following year. He was the judge who presided when both cases were decided, and in the latter case he points out that in *Plummer* v. *Wildman* (4), the master had cut away the rigging in order to

(1) 4 M. & S., at p. 149.
(2) 3 M. & S., 482.
(3) 4 M. & S., at p. 149.
(4) 3 M. & S., 482.

preserve the ship, and afterwards put into port to repair that which he voluntarily sacrificed for the benefit of all.

Now, according to par. 6, the donkey-engine and coals were a part of the regular equipment of the ship, and used for loading and unloading cargo, hoisting sails, and taking them in, and pumping the ship. If from the unexpected length of the voyage, and tempestuous weather causing the vessel to strain and leak, and so making pumping indispensable for the safety of the ship, the supply of coals ran short, and the ship made for the nearest coal depot to provide a further supply, without which the voyage could not be prosecuted with safety, could the expense of providing this further supply go into general average? Would it not fall upon the owners as part of the necessary expenses of navigating the ship?

Or, again, if from excessive use in any of the purposes for which the donkey-engine was used, it broke down, and it was necessary to go into port to repair it, would the expense of going into port fall into general average? In those States in America in which it has been held that the expenses of going into port to repair damage from tempest are matter for general average this might be so, but it is submitted it would not be so here.

Or suppose that there were no means of repairing the damage to the engine in the case last put, and therefore, instead of the engine and coals, the captain ships an equivalent crew of ten men (see par. 6) could this expense go into general average?

It is hardly necessary to point out the distinction between the several cases last put, and a case put in the argument, viz., that if a vessel with a full and complete crew were unable to keep down a leak, so that if nothing further were done the ship 52] would go to the *bottom, then the expenses of sending ashore and getting additional hands, or it may be a donkey-engine, to keep down the leak, would go into general average. In that case the emergency would be urgent and imminent, and the emergency would not be caused by the having coals on board which are consumed by being used, instead of a crew which is not so consumed.

Kelly, C.B., delivered the judgment of himself and Bramwell, B. It seems to us that this is a case of general average. The ship was well found seaworthy, and with a proper quantity

of coal for the donkey-engine. She sprung a leak, and through it must, if the donkey-engine ceased to work, have foundered in a few days or hours, unless some relief not to be foreseen or calculated on had arrived. The arbitrator finds that she had coal for a few hours only; that had she burned her coal, wood would not have sufficed to keep up the fires, but that by combining coal and wood the fires could be kept up for a much longer time. Accordingly the captain prudently and properly sacrificed some spare spars, and saved the ship and cargo. There seem to us here all the ingredients of a case of general average. Peril of the seas imminent, certain loss in a short time unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all. Suppose the wood had been cargo, and the captain had burned it, would it have been a wrongful act in the captain? would not the owner have had a good claim for general average? would not the captain have failed in his duty unless he had burned these spars, whether the property of his owner or cargo? Suppose the donkey-engine had been cargo, and had been fitted up on the springing of the leak, and the wood burned as now. It is said that the danger was not imminent, that there was no emergency. We think there was, and that a certainty of destruction within a short time unless prevented is an emergency and imminent. Suppose a vessel ran for shelter into a river where no supplies could be obtained; suppose she would have to stay a fortnight unless she got out at the then spring tides; suppose her provisions would fail her in that time; suppose, to get out, she lightens herself by throwing some heavy cargo overboard; would not that be a case of emergency and imminent danger? We think it would, and that such is the *result of all the authorities, some of which may now be briefly [53 considered.

A general average has been defined to be "a loss arising out of extraordinary sacrifices made or extraordinary expenses incurred for the joint benefit of ship and cargo;" per Lawrence, J., in *Birkley* v. *Presgrave* (1). *Wilson* v. *Bank of Victoria* (2), cited on behalf of the defendants, only shows that where steam power is substituted for sailing power, which from injury to the ship had been exhausted, the additional expense of the fuel is

(1) 1 East, at p. 228.

(2) Law Rep., 2 Q. B., 203.

not to be deemed an extraordinary expense within the meaning of the rule. But the present case is not one of substitution at all. It was necessary, in order to keep the ship afloat, that additional fuel should be found. The coals on board by themselves would have been insufficient, and to feed the fires a number of spars, the property of the shipowners, and part of the ship's stores, were cut up and used in addition to the coals as fuel. This was, we think, an extraordinary sacrifice, and necessary, as may be fairly inferred from the statements in the case, to save the ship from sinking. In principle this seems to be within the case of *Plummer* v. *Wildman* (1), where part of the rigging of the ship was cut away, and the expenses of returning to port to repair the damage, without which the ship could not have prosecuted her voyage or safely kept the sea, were held to be the subject of general average. This case is supposed to have been shaken by the case of *Power* v. *Whitmore* (2), decided shortly afterwards; and so in *Hallett* v. *Wigram* (3), where a part of the cargo had been sold to raise money at a port to which the ship had put back for the repair of damages incurred by the ordinary perils of the sea, it was held to be no case of general average; but the true principle, as applicable to these cases, is well stated in Abbot on Shipping, p. 497 (referred to in 9 C. B., 603) in these terms: "It seems to result from these decisions, that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages and
54] provisions during the stay, are to be *considered as general average; but if the damage was incurred by mere violence of wind and weather, without sacrifice on the part of the owner for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner to keep his vessel tight, staunch, and strong during the voyage for which she is hired." The late case of *Kemp* v. *Halliday* (4), in the Exchequer Chamber, is in strict conformity with the doctrine there laid down by Lord Tenterden.

Upon these grounds we are of opinion that, as regards the spars cut up and the ship's materials used for fuel, this is a case

(1) 3 M. & S., 482.
(2) 4 M. & S., 141.
(3) 9 C. B., 580.
(4) Law Rep., 1 Q. B., 520.

of general average; but not so the cost of the coal obtained from the *Peru*, or purchased at Pernambuco, or of the repairs of the donkey-engine. Upon this point, therefore, we think the plaintiff entitled to the judgment of the Court, and that the case must be referred back to the arbitrator.

The Court being equally divided, Cleasby, B., withdrew his judgment, and the Court gave

Judgment for the plaintiff, the case to be remitted to the arbitrator to assess the general average contribution in respect of the spars and wood.

Attorneys for plaintiff: *Westall & Roberts.*
Attorneys for defendants: *Walton & Bubb.*

Jan. 17, 1872.

*Mouflet v. Cole. [70

(Law Reports, 7 Exchequer, 70.)

Measurement of Distance — Covenant not to carry on Trade within a specified distance — Distance "as the Crow flies" — Nearest Mode of practicable Access.

The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on that business within half a mile, if the distance were measured in a straight line, "as the crow flies," but not within half a mile, if the distance were measured by the nearest mode of practicable access: —

Held **(by Martin and Channell, BB., Cleasby, B., dissenting), that there had been a breach of the covenant.**

Action to recover a sum of 500*l.* as liquidated damages for the breach by the defendant of his covenant with the plaintiff that he would not carry on the business of a publican within the distance of one-half of a mile of the premises called the "Lord Holland." The defendant traversed the breach. Issue.

The cause was tried before Martin, B., at the Middlesex sittings in Michaelmas Term, 1871, when it was proved that the

defendant had carried on the business of a publican in a house within the distance of one-half mile of the plaintiff's house, the Lord Holland, measuring in a straight line, or "as the crow flies," but beyond that distance, measuring by the nearest mode of practicable access. A verdict was entered for the plaintiff for 500*l*., with leave to move to enter a verdict for the defendant, if the Court should be of opinion that the true mode of measurement was by the nearest mode of practicable access. A rule was afterwards obtained accordingly.

Nov. 18, 1871. *Parry*, *Serj*., and *F. Turner* showed cause. *Garth*, *Q.C.*, and *A. L. Smith*, supported the rule.

The cases cited and the arguments used are fully stated in the judgments of the learned Judges.

Cur. adv. vult.

Jan. 17. The Court being divided in opinion, the following judgments were delivered:—

MARTIN, B. The question in this case is in its terms very simple. The plaintiff had bought from the defendant a public-
71] house *called the "Lord Holland," and the defendant covenanted that he would not carry on the business of a publican "within the distance of one-half of a mile of the premises called the 'Lord Holland,'" and the question is how the distance of half a mile is to be measured. The plaintiff contends that the true mode of measurement, that is, the true construction of the language used, is that a circle of half a mile radius is to be drawn round the Lord Holland, and that if the defendant carries on the business of a publican within this space he has broken his covenant. The defendant on the other hand contends that the true construction of the covenant is, that if there be half a mile between the Lord Holland and the house where the defendant carries on business, measured by the nearest way of access, there is no breach of the covenant.

Now if the question were new and had never before arisen, I think the plaintiff's contention is right. Every written document is to be construed according to the ordinary natural and grammatical meaning of the language used, and when a man covenants that he will not do an act within a certain distance

of a given spot, it seems to me that the true mode of determining the distance is to describe a circle, with a radius of the distance, around the spot, and that if the act be done within this circumscribed distance the covenant is broken, and that it is an unnatural and unreasonable construction to say that the distance is to be measured by the then existing way of access. Supposing the Lord Holland was on the bank of a river fifty yards wide, and that the bridge across the river was upwards of a quarter of a mile from the Lord Holland, this construction of the covenant would enable the covenantor to set up a public-house on the opposite bank, within fifty yards of the Lord Holland. This, as it seems to me, would be in direct contravention both of the words and spirit of the covenant. Again, supposing that by the existing mode of access the distance was upwards of half a mile, but by a new road the distance was reduced to less than half a mile, there would be no breach of the covenant until the new road was made; but there would be afterwards. I cannot but think such a construction of the covenant would be unreasonable, giving it one operation in one state of things, and another in another; and if I had had to decide the question, independently of all authority, I would be of *opinion that the plaintiff's construction of the covenant was the [72 true one, and the more consistent with reason and certainty.

But in my judgment the authorities are conclusive. Passing over for the present the case of *Wing* v. *Earle* (1), the first case in order of time is *Woods* v. *Dennett* (2), and there Lord Ellenborough expressed his opinion at *nisi prius* that the nearest way of access was the proper mode of measurement. The next case was *Leigh* v. *Hind* (3). The covenant there was that the defendant would not carry on the business of a victualler "within the distance of half a mile from the premises assigned," a public-house in Bishopsgate Street in London. It was found by an arbitrator that the defendant carried on the business of a victualler within half a mile by the nearest way of access, and of necessity within the radius of the half mile, and the unanimous judgment of the Court was that the covenant was broken; but Lord Tenterden and Mr. Justice Littledale stated their opinion to be that the distance was to be measured by the nearest way of access, and Mr. Justice Littledale stated that if this

(1) Cro. Eliz., 212. (2) 2 Stark. N. P., 89. (3) 9 B. & C., 774.

covenantor took a public-house, the distance of which, by the then shortest way of access, was greater than the half mile, there would be no breach of covenant; but if a new street were opened, whereby the distance became less than half a mile, there would be a breach. On the other hand, Mr. Justice James Parke declares his dissent from this construction, and said that he was of opinion that the proper mode of measuring the distance was by taking a straight line from house to house, or, as he expresses it "as the crow flies." He referred to the case of *Woods* v. *Dennet* (1), and there is no room for mistake or misunderstanding as to his opinion. Now these opinions were not necessary for the decision of the case, but they were the opinions of three of the most eminent judges of modern times, and the present question is, which of them have been adopted in subsequent judgments. The question next arises in *Reg.* v. *Inhabitants of Saffron Walden* (2). That decision was upon an enactment that no person should retain a settlement in a parish for any further time than he should inhabit within ten miles thereof. The case of *Leigh* v. *Hind* (3) was cited. Lord Denman said the most reasonable rule was that approved of by
73] *Mr. Justice Parke, namely, a measurement by a direct line. He added, this would avoid the practical difficulty of settlement being good one day and bad the next; or that there should not be a breach of covenant one day, but a breach the next. The next case is *Stokes* v. *Grissell* (4): the question there was whether "the plaintiff dwelt more than twenty miles from the defendant;" Jervis, C.J., stated his opinion to be that the proper measurement was a straight line on the horizontal plane from point to point, and not by the road. Mr. Justice Maule stated that he agreed with Mr. Justice Parke in *Leigh* v. *Hind* (5), and that in his opinion the proper mode of measuring was on a straight line from point to point, and that upon the question he entertained no doubt at all. The next case is *Lake* v. *Butler* (6). The question was, whether the plaintiff dwelt more than twenty miles from the defendant, and Lord Campbell, Mr. Justice Earle, and Mr. Justice Crompton expressed a clear opinion that the straight line and not the nearest way of access was the true

(1) 2 Stark. N. P., 89
(2) 9 Q. B., 76.
(3) 9 B. & C., 774.
(4) 14 C. B., 678; 23 L. J. (C.P.), 141.
(5) 9 B. & C., 774.
(6) 5 E. & B., 92; 24 L. J. (Q.B.), 273.

mode of measurement. The next case is *Jewel* v. *Stead.* (1) The question there arose upon an enactment that no toll-gate should be erected within three miles of another toll-gate called "Bargate." The toll-gate was by the road more than three miles from Bargate, but by the straight line less. Now here it might have been plausibly argued that the object of the legislature was to protect the traveler from a second toll until he had traveled three miles of road, and that when he had traveled three miles the legislature did not mean to prohibit a second toll, but the Court of Queen's Bench held that the straight line was the true measurement. These are the authorities in the courts of law, but there is a case in equity directly in point to the same effect — *Duignan* v. *Walker.* (2) An attorney had covenanted not to carry on business within seven miles from the plaintiff's office. The question was raised — nearest way of access or straight line — and the present Lord Chancellor decided, apparently without doubt or difficulty, that the distance was to be measured in a straight line upon a horizontal plane. There was another case cited, *Wing* v. *Earle.* (3) The defendant had sold the plaintiff wood which was *to be growing four [74 miles from Rye, in Sussex. The defendant pleaded that the wood by the nearest and usual highway was four miles from Rye. The Court gave judgment for the plaintiff. Mr. Justice Fenner said that if the question had been upon a statute, the miles should be construed according to the usual way for carriages, but upon the condition, which is the same as a covenant or contract, if it be within four miles any way the condition, or in other words, the covenant or contract is broken. This is in favor of the plaintiff's contention.

My opinion is, that the construction put upon the covenant by Mr. Justice Parke and Mr. Justice Maule is the correct one. All the subsequent authorities without exception adopt it; there is no authority to the contrary, at least none has been cited by the learned counsel for the defendant. It was said that one construction was to be given to these words in an Act of Parliament, and another in a deed or contract. I should be very loth to do so. It possibly may be that circumstances may exist in a peculiar case to justify such construction, but in my opinion

(1) Joh., 446; 6 E. & B., 350; 25 L. J. (Q.B.), 294.

(2) 28 L. J. (Ch.), 867.

(3) Cro. Eliz., 212.

there is nothing in this case calling for it. It was also said that the measurement of the straight line, as stated in some of the judgments, is not practicable. I have inquired as to this from one of the most competent persons in this kingdom, and have been informed that it may be easily measured with sufficient correctness for all practical purposes by means of the Ordnance Map.

There is the case of *Atkyns* v. *Kinneir* (1) (I believe not cited in the argument), in which it is supposed that Mr. Justice (then Baron) Parke expressed himself as having altered his opinion in the case of *Leigh* v. *Hind*.(2) I do not so understand him. The covenant there was "that the defendant would not practise as a surgeon at No. 28, Dorset Crescent, or within two and a half miles thereof, *measuring by the usual streets, or way, or approach thereto*, nor reside within two and a half miles of No. 28, Dorset Crescent." There can be no doubt as to the meaning of this covenant, and all that I understand him to have said is, that the rule for such a case was laid down in *Leigh* v. *Hind* (2), namely, that the true principle of admeasurement is to take the nearest mode of access according to the existing state of the
75] streets. This was the opinion *of the majority of the Court, but I find nothing to indicate that he himself had altered his opinion.

In my judgment, both upon the reason of the thing and on authority, the plaintiff's contention is right, and the rule ought to be discharged. My Brother Channell agrees in this judgment.

CLEASBY, B. In this case the question arises upon the proper construction of a covenant in the assignment of the lease of a public-house called the "Lord Holland."

The covenant is a usual one, and the words are, "that the defendant will not carry on the business of a publican within the distance of one-half of a mile of the premises called the 'Lord Holland.'" And there is a covenant to pay a sum of 500*l.* as stipulated damages for the breach of this covenant.

The defendant had taken a public-house after the assignment, and carried on business in it, and the question was, whether this was a breach of the covenant according to its proper construction. There was a verdict for the plaintiff for the stipulated

(1) 4 Ex., 776. (2) 9 B. & C., 774.

damages, 500*l.*, with leave for the defendant to move the Court to enter a verdict in his favor.

The plaintiff contended that in ascertaining the distance it was to be measured by the shortest line, or as the crow flies; the defendant contended it was to be measured by the nearest available mode of access between the two houses.

In my opinion the distance is to be measured as a traveled distance, and I should say the proper terminus would be from the door of or entrance to one place of business to the door of or entrance to the other.

I cannot think it would be in accordance with the intention of the parties to ascertain first, by some process not very easy, what are the two points of the two places of business which are nearest to each other, and then, by another process (perhaps more difficult) what would be the length of the line drawn between those two points. If one can suppose the question to arise as an abstract question, what is the distance between two fields, I apprehend the latter would be the proper mode of arriving at it. And in general, in ascertaining the distance between two known things, whether it be of a planet from the sun at a particular time, or of one beacon *or telegraph [76 from another, it would be ascertained by supposing a line to be drawn straight (or, as the phrase is, "as a crow flies,") from one to the other, and then calculating the length of that line. But where the question does not arise in this form, but the distance is coupled with something to be done within or without that distance, I apprehend no such rule can be applied. It is true that words are to be read generally in their ordinary, natural, and grammatical meaning; but this does not mean that the words are to be taken by themselves, as if they stood alone, and then their ordinary and natural meaning given to them. I conceive the subject-matter and object of the whole agreement must be first considered before the meaning of the words can be looked for with any chance of finding their proper meaning. The rule is correctly stated in Broom's Legal Maxims, 5th ed., p. 647: "The subject-matter of an agreement is to be considered in construing the terms of it, and they are to be understood in the sense most agreeable to the nature of the agreement." I feel satisfied that the word "distance" must receive a meaning depending upon the subject under consideration. For example,

in considering the distance between London and its antipodes, if we were dealing with a subject relating to the intercourse between the two countries and voyages, I should say the distance would be taken upon the surface of the earth by the best course which a vessel could take; but if we were dealing with a subject relating to the system of the world and the magnitude of the planetary bodies, the distance would be the earth's diameter.

Now here we are dealing with a contract, the object of which is to protect one person from the competition of another, who has obtained in one public-house a certain connection, and may on other grounds be a successful rival; and the mode of doing this is by preventing the trade of the one from being carried on within a certain distance of the other. It strikes me very strongly, that this would be the distance it would take to get from one place to another. A person who was under a covenant not to carry on business within half a mile, and took another house at the distance of three quarters of a mile by the nearest road, would never think of his liability depending upon the length of an imaginary line, which cannot be trodden or measured, but only calculated.

77] *It was suggested in argument, that the distance could be practically measured and ascertained upon an ordinary map; but even if it be assumed that an ordinary map is a mode of measurement contemplated or thought of by such persons as make these agreements, and also that the map of London would give the means of making this measurement with anything like accuracy, I do not think the construction of such a contract can depend upon there being of late a survey upon a large scale, and that it would be one thing before such survey, and another after.

If you were to ask any person how far he lived from some friend, would not his answer have reference to the distance to be traveled? He might add, it was strange it was so far, because as the crow flies it was only half the distance. This would not show that the words are to be understood in that sense, but the contrary.

In considering the distance between two places on the opposite slopes of a mountain, strictly speaking, it would be measured by a straight line passing through the earth and joining

them; but, except when some scientific subject was under consideration, would any one think of measuring it, except on the surface — that is, by going up to the top of the mountain, and then down again, and so, perhaps, doubling the other distance.

My opinion, therefore, independently of authority, would be that the covenant in this case would not include every place within an imaginary circle drawn with a radius of half a mile, the centre being some part of the Lord Holland. I think, in determining whether any other place of business is within the covenant, no supposed circle need be drawn, but you have only to measure the distance of such a place from the Lord Holland in the manner which I have mentioned.

There is nothing in the authorities to bind me to come to a different conclusion. On the contrary, the preponderance of the authorities, when properly considered, is, I think, in favor of this view. I say properly considered, because I do not think that any authorities relating to the mode of measuring distance under different circumstances have any bearing upon the present case, for reasons which I have already given. In order to influence the decision in the present case, the distance must be assigned for the purpose of relieving one person from the competition of another *in a particular trade. And this ap- [78
pears to dispose of most of the cases cited in the argument.

In the case of *Wing* v. *Earle* (1), the matter determined was upon a mere question of locality — how the distance of a wood from a certain place was to be measured. In the case of *Reg.* v. *Inhabitants of Saffron Walden* (2), the question arose upon the statute 4 & 5 Wm. 4, c. 76, which enacts that no person shall retain a settlement by reason of any estate or interest in a parish for a longer period than he inhabits within ten miles thereof. The Court thought that, as there was nothing in the nature of the subject to assist in the construction of these words, an arbitrary rule must be laid down. And they held the ten miles must be measured in a straight line from the residence to the nearest part of the parish. There are some remarks of the judges in this case which will be considered in connection with the cases involving the same question as the present.

In *Stokes* v. *Grissell* (3), which was pressed on behalf of the de-

(1) Cro. Eliz., 212. (2) 9 Q. B., 76.
(3) 14 C. B., 678; 23 L. J. (C. P.), 141.

fendant, the question adverted to (but not raised for decision or decided), was, how the distance of twenty miles, mentioned in an Act of Parliament (the County Court Act, 9 & 10 Vict. c. 95), was to be measured, and the case has no bearing upon the construction of an agreement like the present, where the subject-matter and intention of the parties must be considered. The observations of the judges, particularly Mr. Justice Maule, so far as they bear upon the present case, will be afterwards noticed.

In *Lake* v. *Butler* (1) the question was the same as in *Stokes* v. *Grissell* (2), viz., the measurement of the twenty miles mentioned in 9 & 10 Vict. c. 95, and the Court adopted the view expressed in the former case; but there is nothing in the judgments indicating an opinion in favor of the straight line rule in such a case as the present. On the contrary, the judgments are all founded upon the general words of the Act of Parliament.

In *Jewell* v. *Stead* (3) the question arose upon a turnpike Act, which provided that no toll-gate should be erected within three
79] *miles of another toll-gate, and all that was decided was, that the general rule should be adhered to, that when in an Act of Parliament distance is mentioned generally without any other guide, the straight line rule is to be adopted. This is one of the cases in which Lord Campbell says that the distance is to be measured by a straight line on the horizontal plane. This measurement of distance on a horizontal plane is a proper mode of measurement when you are laying down an arbitrary rule to determine whether a particular case comes within an Act of Parliament or not, there being no question of conduct and of liability by reason thereof; but when the whole question arises upon the conduct of the parties, such a rule, it is submitted, is wholly inapplicable. For the consequence would be, that if a man were upon a tolerably steep hill to measure a straight line from one house to another, and find the distance thirty or forty yards beyond the half mile, and upon that measurement to start business at the other house, he might, afterwards find himself made liable by the operation of this rule, because the distance taken upon the horizontal plane was less than the half mile.

(1) 5 E. & B., 92; 24 L. J. (Q. B.), 273. (2) 14 C. B., 678; 23 L. J. (C. P.), 141.
(3) 6 E. & B., 350; 25 L. J. (Q. B.), 254.

The above authorities were relied on by the defendant upon the argument, and it is submitted they bear very remotely upon the present question.

The authorities which really bear upon the present case are the following: —

Woods v. *Dennet* (1). In this case the same question arose as in the present case, how the distance was to be measured when a person, under similar circumstances to the present, gave a bond not to carry on the business of a cheesemonger within a mile of the plaintiff's shop. The distance had been measured different ways, and there can be no doubt that if the distance had been taken, including all within a radius of a mile, the place would have been within it. The rule laid down by Lord Ellenborough for the guidance of the arbitrator, to whom the case was referred, was, that in ascertaining the distance, the shortest way of access by the footpath was the proper line of admeasurement.

We have, therefore, a decision in point so far back as 1817, on a matter upon which persons would make a rule to go by, and which *may have influenced the conduct of persons [80 under like circumstances since.

There is then a case of *Leigh* v. *Hind* (1). In that case the question was precisely the same as the present, arising upon the assignment of a lease of a public-house in London. The case had been referred, and the arbitrator had the measurement made in three different modes, all of them connected with the modes of access. And he found, as a fact, that the one house was within half a mile of the other. If the distance could have been taken by the suggested radius, it was clearly within the distance, and no question could have arisen, and the majority of the Court must have rejected such a measurement. Nothing can be clearer than the judgment of Lord Tenterden and Mr. Justice Littledale. The radius measurement had been suggested, but they do not think it worthy of notice. The question may be stated to have been between the mode of access which was actually the nearest, and which went part by footway and part by the carriageway, which it was suggested the customers of the public-house would not use, and another by the footway, which it was said the customers would use, and the difference was very small between them, but sufficient to turn the balance.

(1) 2 Stark. N. P., 89.

(1) 9 B. & C. 774.

Lord Tenterden says, "Now, unless the nearest mode of access be taken, it is impossible to say what other mode should be taken. If we depart from it a little in this case we may be called upon to depart from it still more in another, and the consequence will be that there will be no certain rule applicable to the subject. I think the distance must be measured by the nearest mode of access." Nothing can be stronger than this language. Lord Tenterden considers it as the settled rule not to be departed from.

The language of Mr. Justice Littledale is equally strong. He says, "The true principle of admeasurement is to take the nearest mode of access according to the existing state of the streets. If subsequently to the assignment the covenantor took a public-house the distance of which by the then shortest mode of access would be greater than that agreed upon from the one he sold, and a new street was afterwards opened whereby the distance by the shortest mode of access became less than the 81] one mentioned *in the covenant, the covenantor would thereupon incur a breach." So that the actual distance at the time as influencing the trade of the one upon the trade of the other is the test, and the covenantor takes upon himself by his general covenant the risk of any alteration.

Mr. Justice Parke, in that case, was of a different opinion. He thought that the proper mode of measuring the distance would be to take a straight line from house to house, in common parlance "as the crow flies," and that it should be ascertained without any reference to the modes of communication. But the reason which he gives is, that neither of the parties contemplated that the customers of one public-house were to go thence to the other. This is quite true, but does not seem a good reason, as the object of the covenant was not to guard against customers going from one house to the other, but to secure the covenantee a certain area of custom between the two houses, free from the injurious competition of the covenantor. The learned judge adds that in *Woods* v. *Dennet* (1), the plaintiff's counsel may have thought it unnecessary to insist upon this mode of admeasurement, as he probably considered he had a good case, supposing the other to be adopted. I can hardly think this well founded; it suggests that the plaintiff's counsel

(1) 2 Stark. N. P., 89.

did not think it worth while to insist upon a test which was certain in his favor, because he had another uncertain one on which he might succeed. The opinion of so eminent a judge would, no doubt, take from the weight of the other authorities; but whatever his opinion at the time of the last cited case was as to what the rule ought to be, the effect of it is entirely removed by his clear opinion in a subsequent case as to what the rule really was; and what is the result of the decision in the case of *Leigh* v. *Hind* (1) last referred to? I refer to the case of *Atkyns* v. *Kinneir*.(2) The defendant, in addition to a covenant not to carry on the business of a surgeon within a certain distance from 28, Dorset Square, to be measured in a particular manner, also covenanted generally not to reside within the distance of two miles and a half from that place. The following is Baron Parke's judgment: "The question was, whether the defendant resided within two miles and a half from the plaintiff's residence, measuring by any of the usual ways of communication. *The rule laid down in *Leigh* v. *Hind* (1) is, [82 that when there is a stipulation as to non-residence within a prescribed distance, the true principle of admeasurement is to take the nearest mode of access according to the existing state of the streets. The object of this covenant was to prevent the defendant from residing within two miles and a half of the plaintiff, measuring by any of the usual and ordinary modes of communication." So that Baron Parke distinctly recognizes, in 1850, the rule laid down in 1829 by Lord Tenterden and Mr. Justice Littledale, in *Leigh* v. *Hind* (1), as the proper one, though at variance with the opinion then expressed by him. And this rule, as applied to such a case, appears to have been regarded as a settled rule by the Court of Queen's Bench, in the *Saffron Walden Case* (3) already referred to, in which they applied the straight line test to the Act relating to settlements. Lord Denman says in that case: "In *Leigh* v. *Hind* (1) one learned judge, my Brother Parke, thought that the natural mode of estimating the distance was as the crow flies; but there with reference perhaps to the object of the contract, the measurement by the nearest accessible route was adopted. Here we are very much at large, and without materials for judgment; we find no words referring to any particular object. We have, therefore, to lay

(1) 9 B. & C., 774. (2) 4 Ex., 776. (3) 9 Q. B., 76.

down a fixed and absolute rule." It is going a great way to cite this as an authority for the straight line rule as applicable to such a case as the present, when the reason for adopting it was that there were not such materials as the present case presents for any other rule. Mr. Justice Patteson's judgment is to the same effect, and founded entirely upon there being in that case no other guide except the words "ten miles."

We have therefore, it is submitted, a remarkable concurrence of authority, dating from the year 1817, and reaching to 1850, upon which it would be supposed men could act with a feeling of perfect security.

The authorities in favor of the straight line rule, as applied to such a case as the present, are, first, the incidental remarks of Mr. Justice Maule in *Stokes* v. *Grissell* (1). He says in his judgment (2), "As to the mode in which the twenty miles are to be 83] *measured, I think that pointed out by my Brother Parke is the right one, and that they are to be measured by a straight line drawn from point to point." He then goes on to say, after referring to the words of the 128th section of the Act of Parliament, that there is no manifest inconvenience in giving to the words their plain unambiguous meaning, and that the distance should be measured as the crow flies. Without detracting from the value of anything said by that eminent judge, it may be observed, first, that the mode of measurement was not the subject for discussion; and, secondly, that so far as it arose incidentally, Mr. Justice Maule was applying it to an Act of Parliament, and not to an agreement where the object of the parties is to be considered.

The only other authority in favor of the plaintiff is a case in equity, *Duignan* v. *Walker*. (3) It was much relied on as being in point in his favor. It arose upon an application to commit a man for breach of an injunction not to practise as an attorney, or clerk to an attorney within seven miles from the plaintiff's office. The report is in a few lines, and no case was cited except *Lake* v. *Butler* (4), which decided that the twenty miles mentioned in the County Court Act must be measured in a straight line. The learned judge (Wood, V.C.), is reported to have said, "The distance must be measured in a straight line upon a

(1) 14 C. B., 678; 21 L. J. (C.P.), 141.
(2) 23 L. J. (C.P.), at p. 143.
(3) Joh. 446; 28 L. J. (Ch.) 867.
(4) 5 E. & B. 92; 24 L. J. (Q.B.) 273.

horizontal plane," and as the facts were disputed, all that the judge did was to direct an inquiry. eradandleft home for a

Upon this case it may be fairly observed (without relying upon any supposed distinction between that case and the present), that all that was done was to direct an inquiry, and when the question of committal came forward the case might perhaps be more carefully considered, and further that the court was dealing with the terms of its own injunction; and as the case of *Lake* v. *Butler* (1) was the only one referred to, the conclusion arrived at would naturally follow. And it is tolerably clear that *Lake* v. *Butler* (1) (though, as has been already shown inapplicable) was implicitly followed, for the words of the judgment are identically the same as those of Lord Campbell in that case, including the horizontal plane.

It is submitted that this authority does not balance the weight *of authority already given for the other conclusion, and [84 I am, in my judgment in this case, much influenced by the consideration that, if the distance were so far extended by now adopting the radius rule, many persons would be exposed to actions for large amounts of unliquidated damages who had regulated their conduct by a rule founded upon ample authority. They would not relieve themselves from this liability by removing their business, in consequence of a different rule being now laid down.

I think the rule should be made absolute to enter a nonsuit.

Rule discharged.

Attorneys for plaintiff: *Stileman & Neate.*
Attorneys for defendant; *Shum & Crossman.*

(1) 5 E. & B. 92; 24 L. J. (Q.B). 273.

When the course of a deed is from one point to another it calls for a straight line. *Jenks* v. *Morgan*, 6 Gray, 448. *Allen* v. *Kingsbury*, 16 Pick., 235.

Jan. 17, 1872.

WILSON v. HODSON and another.

Law Reports, 7 Exchequer, 84.

Executor of Executrix de son Tort — Liability for breaches of Contract by Person with whose Assets Executrix de son Tort has intermeddled.

The executor of an executrix de son tort is not liable for a breach of contract committed by the person with whose property the executrix de son tort has intermeddled.

DECLARATION against the defendants as executors of Anne Browne, who was the executrix of Warham Browne, alleging that on the 23d of June, 1853, an agreement in writing was made between the plaintiff and Warham Browne in the words following [here followed the agreement, which was for a demise for a term of certain furnished premises, with stipulations (among others) that the furniture, &c., should be kept in the same state as when delivered to the lessee, and that the premises should be kept in good and tenantable order, and so given up.] That Warham Browne occupied until his death, whereupon Anne Browne entered and occupied as executrix until her death, after which the defendants surrendered the premises and quitted occupation thereof; that Warham Browne did not, nor did Anne Browne as executrix, keep the furniture in the same state as when delivered to Warham Browne, nor did they, or either of them, keep or give up the premises in good and tenantable repair.

85] *Plea 12: That Warham Browne died intestate, and Anne Browne was never his executrix otherwise than executrix de son tort, and that the defendants never had notice or knowledge that Anne Browne entered upon or occupied the premises otherwise than in her own right, or that she had ever rendered herself liable to be charged as such executrix de son tort of Warham Browne.

Demurrer and joinder in demurrer.

Trevelyan, in support of the demurrer. The executrix de son tort would have been liable in her lifetime for breaches committed by Warham Browne; and her executors are liable as such, although she was not executrix otherwise than de son

tort. Anne Browne having intermeddled with the intestate's assets would have been estopped from denying her liability, and that estoppel binds the defendants. Again the provisions of 30 Car. 2, c. 7, s. 2, explained and made perpetual by 4 & 5 W. & M. c. 24, s. 12, apply. By those statutes it is enacted that the executors or administrators of any executor or administrator whether rightful or of his own wrong, who should waste, or *convert to his own use*, the goods of his testator or intestate, should be liable and chargeable in the same manner as their testator or intestate would have been if they had been living; and in this declaration there is an allegation that Anne Browne entered and occupied the premises, and did not perform the stipulations in the memorandum of agreement. This is equivalent to a suggestion of waste, or, at all events, of conversion of the plaintiff's goods. [He cited *Browne* v. *Collins* (1); *Wells* v. *Fydell* (2); *Carmichael* v. *Carmichael* (3); *Oxenham* v. *Clapp* (4); *Meyrick* v. *Anderson* (5).]

Ridley, contrà. The declaration does not sufficiently allege a devastavit by the executrix de son tort, so as to bring the case within 30 Car. 2, c. 7; so that the question is, whether, apart from statute, the executors of the executrix de son tort are liable for a breach of contract committed by the person with whose assets the executrix de son tort has intermeddled. They are free from liability, just as the executors of an administrator are held to be free, because the executrix de son tort, like an administrator, is not *a person in whom the deceased has [86 reposed any trust. Indeed their case is stronger than that of an administrator, for the executrix de son tort is appointed neither by the Court nor the testator. Again, there is no such estoppel, as is suggested. The executrix would have been herself estopped, because she had actually meddled with the property of the deceased. But with her death the reason of the estoppel ceases, and her representatives upon whom the property does not devolve, are not bound by it. [He cited Shep. Touch. by Preston, vol. ii. 464; Viner's Abr. tit. Executors, C. (a), F. (a, 5); Anon. Case (6); *Wheatley* v. *Lane* (7).

Trevelyan, in reply.

(1) 1 Vent, 292.
(2) 10 East, 315.
(3) 2 Ph., 101.
(4) 2 B. & Ad., 309.
(5) 14 Q. B., 719.
(6) 2 Mod., 293.
(7) Notes to Wms. Saund., 239.

KELLY, C. B. I think the defendants are entitled to our judgment. They are not the executors of the person who made the contract, of which there was a breach, nor the executors of the rightful representative of that person. No doubt if they were the executors of the duly appointed executor of the contractor the case would be different. Their then testator would have been entitled to possess himself of the first testator's effects, and they would themselves have been liable, unless indeed they could have pleaded plene administravit. But here the defendants are executors of an executrix de son tort, who had not in her lifetime any power to possess herself of the testator's effects, and whose representatives therefore could not claim them. In the analogous case of an executor of an administrator there is no such liability as is contended for in this case. I may add that there is no authority whatever for the proposition contended for by the plaintiff. The principal case cited on his behalf, that of *Wells* v. *Fydell* (1), has really no application, for it was not a case in which the liabilities of an executor of an executor de son tort were considered at all. Moreover, I think the statute 30 Car. 2, c. 7, is conclusive against the plaintiff. Until the passing of that Act the executor of an executor de son tort was not liable even in the case of a devastavit, much less where there has been no devastavit. It is urged that the declaration may be construed as suggesting a devastavit, but that cannot be without putting a very strained meaning upon it.
87] *It is not a declaration under the statute, but must be read in its ordinary sense as charging the defendants as executors with a mere breach of contract committed by the intestate. Reading it in this, its ordinary sense, I think the plea forms a good answer to it.

MARTIN, B. I am of the same opinion. The declaration is not framed under the statute of Car. 2, but upon a supposed common law liability in the defendants as the executors of the person who made and committed a breach of a contract with the plaintiff. The plea shows the defendants to be the executors of the executrix de son tort of the contracting party, and this seems to me to be a good answer to the declaration. Mr. Ridley's able argument shows that although no case exactly in

(1) 10 East, 315.

point has been decided, there can be no doubt as to what our judgment should be. The statute of Car. 2 is beside the question, for there is not in this case any suggestion of a devastavit having been committed by the defendants' immediate testatrix.

CLEASBY, B. I also think the declaration is answered by the plea. It is contended that it shows by implication a devastavit by the defendant's testatrix. But it cannot be so construed in my judgment. Any liability, therefore, which they might have incurred for a devastavit by their testatrix under the statute of Car. 2 is out of the case. I agree, therefore, that our judgment on this record must be for them.

Judgment for the defendants.

Attorneys for plaintiff: *Westall & Roberts.*
Attorneys for defendants: *Cunliffe & Beaumont.*

Jan. 25, 1872.

*CROUCH v. TREGONNING. [88

Law Reports, 7 Exchequer, 88.

Indemnity — Incomplete Assignment of Term — Landlord and Tenant — Occupation under Agreement to Assign — Use and Occupation.

The plaintiff was tenant to L. of a farm from Michaelmas, 1858, for seven, fourteen, or twenty-one years, at tenant's option, at a rent of £80 a year, payable quarterly. In March, 1869, he purported, by an agreement not under seal, to assign the residue of his interest to the defendant, who entered and occupied the farm; but L. withholding his license, which was necessary under the plaintiff's lease, no actual legal assignment was ever executed. At Michaelmas, 1870, the defendant quitted the farm, having given L. a notice of his intention to do so. He might have continued to occupy if he had thought proper, but in fact the property stood empty after Michaelmas. The defendant, whilst in occupation, paid rent to L. for the plaintiff. He never was accepted as tenant by L. In March, 1871, the plaintiff paid L., in respect of rent due from the September previous, the sum of £40, which he now sought to recover from the defendant, either upon an implied indemnity, or by way of rent, or for use and occupation:—

Held, that he was not entitled to recover, there not having been under the circumstances any promise to indemnify the plaintiff against rent accruing after

the defendant's actual occupation had ceased, nor any such relation of landlord and tenant existing between the parties as would entitle the plaintiff to the repayment by the defendant, either as rent or compensation for use and occupation, of the sum paid to L., by the plaintiff

DECLARATION: 1st count. That the plaintiff was tenant to one Edward Lanyon, of certain premises called "Crane Farm," at Camborne, in Cornwall, for an unexpired term, and at a certain rent, specified in a deed made on the 30th of December, 1858, between the plaintiff and Lanyon, and afterwards, in consideration that the plaintiff would give up possession of the farm for the residue of the term to the defendant, and permit the defendant peaceably to occupy and enjoy the same, the defendant promised the plaintiff that he would pay the rent of the farm for the unexpired residue of the term to Lanyon, and would indemnify the plaintiff during the unexpired residue against the payment of the rent; that all conditions were fulfilled, &c., yet the defendant did not pay the rent and indemnify the plaintiff, whereby the plaintiff was obliged to pay, and has paid, two quarters of the rent then due to Lanyon.

2d count. That the plaintiff let to the defendant certain premises called "Crane Farm," at Camborne, in Cornwall, to hold 89] from *10th March, 1869, for the unexpired residue of a term of twenty-one years, commencing from the 30th of December, 1858, at a rent of 80*l.* per annum, payable from the 25th March, 1869, quarterly, of which rent two quarters were due and unpaid.

3d count. For use and occupation, and money paid.

Pleas: 1. To first count, denial of the promise. 2. To second count, denial of the demise. 3. To residue, never indebted. Issue.

The cause was tried before Willes, J., at the Bristol Summer Assizes, 1871, when the following facts were proved:—Edward Lanyon, on the 30th December, 1858, leased Crane Farm, Camborne, in Cornwall, to the plaintiff, for seven, fourteen, or twenty-one years, at the tenant's option, from Michaelmas, 1858, at 80*l.* a year. The lease contained a covenant not to assign, underlet, or part with the possession of the premises without the landlord's written license. The plaintiff occupied the farm until March, 1869, when he agreed with the defendant, by a

memorandum of agreement, dated 10th March, to sell all his interest in the property to the defendant, with the live and dead stock, for a sum to be ascertained by valuers. A valuation was made accordingly, and the sum arrived at was paid by the defendant, who entered into occupation, under the agreement at the beginning of May. The memorandum of agreement was not under seal, and was silent as to who was to pay rent; and the landlord's written license was never obtained. The fact of the defendant's occupation was known to him, and not objected to; but the defendant was never accepted as his tenant, and paid the rent reserved during the time he occupied to Lanyon's agent, for the plaintiff, taking receipts made out to the plaintiff. At Michaelmas, 1870, the defendant quitted the farm, having given to Lanyon, but not to the plaintiff, a notice to quit in the March previous, which he insisted put an end to his liability. If the defendant had thought proper, he might have occupied the land from Michaelmas, 1870, to March, 1871, but he did not in fact do so. It was left empty during that period. Up to Michaelmas he had all the benefit that could be got out of the land. The plaintiff having paid 40*l.* to Lanyon for rent accruing from Michaelmas, 1870, to March, 1871, now sought to recover that amount from the defendant. A verdict was entered upon these facts for the plaintiff, *with leave reserved to [90 move to enter a verdict for the defendant. A rule was afterwards obtained accordingly, on the ground that the defendant was not assignee of the plaintiff, and even if assignee, was not liable to pay rent, there being no express or implied contract of indemnity.

Jan. 23. *A. Charles*, (*H. T. Cole, Q.C.*, with him) showed cause. The defendant occupied until Michaelmas, 1870, and might have gone on occupying. He never terminated his occupation legally, his notice to quit being bad, given as it was to the wrong person, and for the wrong quarter day. Under these circumstances there is an implied indemnity towards the plaintiff, arising from the defendant's acceptance of the estate. It is this which charges him, and not the execution by him of a deed: *Burnett* v. *Lynch* (1). If there had been a regular assign-

(1) 5 B. & C., 589.

ment to him, he would certainly have been liable until he had by assignment over or otherwise divested himself of the estate. It can make no difference, quoad the plaintiff, that there was no regular assignment. The defendant accepted the estate, such as it was, and was not disturbed by Lanyon, who did not object to his being there, although he withheld his written license. But, secondly, the plaintiff is entitled to recover as the defendant's landlord. The defendant originally entered under the equitable assignment, but he remained long after he knew that the assignment could not, for want of the landlord's license, be legally perfected. He was therefore an occupier under a sale which had gone off, and tenant at will to the proposed vendor: *Howard* v. *Shaw* (1). Then, by paying rent to the plaintiff, which in effect he did by paying Lanyon for him, this tenancy at will became a tenancy from year to year, terminable at the March quarter. He was therefore liable either under the second or third counts. He had given an insufficient notice to quit, and continued responsible for the rent. Moreover, he had received the whole benefit of the firm up to Michaelmas, and had the opportunity of continuing his occupation if he had pleased. Constructively, if not actually, he was in occupation until March, 1871.

Lopes, Q.C., in support of the rule. There can be no implied 91] *indemnity, at all events beyond the period during which the defendant actually occupied the premises: *Wolveridge* v. *Steward* (2). Assignment over would have freed him from liability. Here through the plaintiff's failure to obtain his landlord's assent, the defendant had no estate to assign, but giving up possession must be treated as equivalent to assignment. With regard to the second and third counts, no relation of landlord and tenant ever existed between the plaintiff and defendant. The defendant occupied under the agreement of 10th March, 1869, by which he expected to become absolute assignee of the term. The negotiation never definitely went off, but from first to last the assent of the landlord was hoped for by both parties. But even assuming a tenancy, it never was from year to year. The payment to Lanyon cannot, except by a forced construction, be treated as a payment to the plaintiff of rent. Lastly, there

(1) 8 M. & W., 118.

(2) 1 C. & M., 644, at p. 660.

was no occupation after Michaelmas sufficient to charge the defendant on the third count.

Cur. adv. vult.

Jan. 25. BRAMWELL, B. I think this rule should be made absolute. The case has been put before us on behalf of the plaintiff on two grounds, but in my opinion both fail. First it is urged that under the circumstances of the case there was an implied promise on the part of the defendant to indemnify the plaintiff against the half-year's rent, from September, 1870, to March, 1871, which he has had to pay to Lanyon, his landlord. But I cannot assent to this view. The bargain between the parties was that a regular assignment of the term should be executed. This was never done, because the landlord's license which was required could not be obtained, and, so far, the consideration for the defendant's promise failed. It is also suggested that although no valid legal assigment was ever obtained, there there is an implied obligation on the defendant, arising from his entering upon and remaining to enjoy and use the farm. Now, I am by no means sure that any such promise could be implied by law, even during the period of the defendant's actual occupation. For he might well say, "I was entitled, under my agreement, not only to possession of the farm, but to a valid *assignment of the plaintiff's lease; and not having obtained [92 such an assignment through the plaintiff's default — for it was his duty to get his landlord's license — no promise to indemnify my intended vendor against rent he was liable to pay can be implied from the circumstance of my having occupied as his licensee." However this may be, I think it clear that in this case there was no implied indemnity as regards the rent now sought to be recovered. For that accrued after the defendant's actual occupation had ceased.

Then it was contended, secondly, that the facts established a tenancy from year to year between the plaintiff and the defendant, and the argument was put thus: that the defendant was in possession lawfully, and with the plaintiff's license, and that therefore he was "tenant" to the plaintiff. Further, that rent having been paid to Lanyon, by the defendant for the plaintiff, this, in effect, was rent paid to the plaintiff, and thus,

being a tenant, the defendant, had become a tenant from year to year to the plaintiff. But this is certainly what neither of the parties contemplated; and I do not think, from the facts before us, we can properly infer the existence of a yearly tenancy. It is true that the defendant was lawfully in possession. Lanyon could not have maintained trespass against him, nor could the plaintiff; but it does not follow that there was any tenancy; and looking at the way in which the defendant came in, and the circumstances under which he stopped in, I conclude that no relation of landlord and tenant ever was created; or, if there was, that the defendant's occupation was such as he was not bound to pay for. I am confirmed in this view by the expressions used by Parke, B., in *Howard* v. *Shaw* (1), where he says that the defendant, who had entered under a contract of purchase, was not bound to pay a compensation for the occupation of the land while the agreement under which he entered existed, because the contract showed that he was to occupy without compensation, although he might have been a tenant at will until the conveyance was executed. In this case, however, I am unable to see any evidence of a tenancy to the plaintiff, or of any payment of rent to him so as to make the defendant a yearly tenant. The defendant paid Lanyon, as it 93] seems to me, in the expectation *that he would become, or in the belief that he was, a regular assignee of the plaintiff. The original contract never went off. If it had, and if the parties had formally treated it as at an end, the case might have been different. But nothing of the kind happened; the contract remained imperfect, because the landlord's license could not be obtained. Still, neither plaintiff nor defendant regarded it as completely off. Indeed, both seem to me to have continued to act upon it; hoping, probably, that sooner or later the landlord would give his license. This being so, I am of opinion that there was no tenancy between the parties, and that, for the reasons already given, there was no implied promise to indemnify the plaintiff in respect, at all events, of rent accruing due after the defendant's actual occupation had ceased.

MARTIN, B. I am of the same opinion. Both parties seem to have treated the agreement of the 10th of March, 1869, as an

(1) 8 M. & W., 114, at p. 122.

actual assignment, although it was invalid, not being under seal, and I think both intended that the defendant should occupy the farm during the remainder of the term, paying the reserved rent to the landlord. This being the real intention of both the plaintiff and defendant, I should have been prepared to hold that the defendant was bound to indemnify the plaintiff against this rent, were it not for the case of *Wolveridge* v. *Steward* (1); according to which, it appears that his liability must be limited to the period during which he occupied as assignee. It was there laid down that an assignee was not liable for rent accruing due after he had assigned over to another person, but only during the period of his actual possession. But the rent now sued for accrued after the defendant had ceased to occupy, and on the principle of the case referred to, therefore, I do not think he can recover on the first count of the declaration.

Again, the defendant's case fails on the other counts. There is not, on the facts, enough to warrant us in holding that the relationship of landlord and tenant was ever established between the plaintiff and defendant. Nor can the plaintiff recover for money paid, for the money was paid primarily on his own, and not on the defendant's account. He was himself liable to Lanyon, and the defendant's *liability, if it had existed, would [94 have been by way of indemnity only.

PIGOTT, B. I also think the rule should be made absolute. The defendant entered and occupied the land under an agreement which was not in itself a valid assignment. There can be no doubt, however, either that he thought it was valid, or at any rate expected at some time to have it made valid. This expectation, owing to the landlord's refusing his license, was never fulfilled, and therefore the defendant did not get what he had bargained for. Then in September, 1870, he throws up both land and contract, and cannot, in my opinion, be made liable on an implied promise to indemnify the plaintiff against rent accruing after that date. As to the second point, I do not think any relation of landlord and tenant ever existed between the parties. Certainly none such was ever intended. The defendant would seem to have thought he had become Lanyon's tenant. He was never the plaintiff's tenant, but merely con-

(1) 1 C. & M., 644.

tinued to occupy, with the plaintiff's permission, pending the negotiations for a regular assignment, which do not appear ever to have come definitely to an end.

Rule absolute.

Attorneys for plaintiff: *Gregory & Rowcliffes, for Benson & Elletson, Bristol.*

Attorneys for defendant: *Price, Bolton, & Filder, for Daniel, Bristol.*

Feb. 1, 1872.

96] *[IN THE EXCHEQUER CHAMBER.]

Law Reports, 7 Exchequer Reports, 96.

BURROWS v. THE MARCH GAS AND COKE COMPANY.

Damages — Remoteness — Injury resulting from Two Independent Causes — Negligence — Breach of Contract or Duty — Measure of Damages.

The defendants, a gas company, contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe laid down under the contract into the plaintiff's shop. The servant of a gasfitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's stock and premises. On the trial of an action against the defendants for their breach of contract in not supplying a proper service pipe, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied; and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Upon these findings:—

Held, affirming the judgment of the Court below, that the plaintiff was entitled to recover, and that the defendants were not relieved from liability by the negligent act of the gasfitter's servant.

APPEAL by the defendants from a decision of the Court of Exchequer discharging a rule to enter a verdict for them.

The pleadings and facts are fully stated in the report of the case in the court below (1).

(1) Law Rep., 5 Ex., 67.

O'Malley, Q.C. (*W. Graham* with him), for the defendants, contended, first, that the negligence of Sharratt, the gasfitter's servant, deprived the plaintiff of his right to recover. Sharratt was not actually in the plaintiff's service, but he was in a position equivalent to service, and his conduct amounted to contributory negligence in the plaintiff. And, secondly, that the verdict should at any rate be for nominal damages only.

[He cited, in addition to the cases referred to below, *Harrison* v. *Great Northern Ry. Co.* (1); *Thorogood* v. *Bryan* (2).]

Holker, Q.C. (*Merewether* with him), for the plaintiff, was not called on.

COCKBURN, C.J. We are all of opinion that the judgment should be affirmed. The action is not for negligence in its ordinary sense, but for the breach of a contract whereby the defendants *promised to supply the plaintiff with a proper and [97 sufficient service pipe from their mains to a gas meter within his premises; and the question is, whether there has been a breach of this contract. There can be no doubt that there has been a breach. The contract was not to supply a pipe which might, perhaps, be defective until it was tested, but to supply a pipe reasonably sufficient for the purpose for which it was to be used. The defendants failed to do so. The pipe they supplied was defective, and the consequence — the natural and necessary consequence — was that the gas escaped, and having so escaped, a further natural consequence was that an accident might be expected to result. Now, what can the defendants allege in defence. As I understand their contention, it is that, because the explosion which actually happened was immediately caused by the gasfitter employed by the plaintiff to test the pipe negligently using a lighted candle whilst he was trying to discover whether the pipe was faulty or not, they are exonerated. It is true, indeed, the jury found this man was guilty of negligence; but his negligence was not the plaintiff's. Neither he nor Bates, his master, were in the plaintiff's employment, but were independent tradesmen. But where a person employs one man to furnish materials, and another to do work with these materials, I cannot think that, because the second man is guilty of negligence, the first is not to be liable if the materials supplied by him

(1) 3 H. & C., 231; 33 L. J. (Ex.), 266. (2) 8 C. B., 115.

were not according to contract. But that is what the defendants must contend for in this case.

They appear to me to be liable upon another ground. They ought to have taken care, before laying gas on, that the apparatus of which this pipe was a part was safe and sufficient. They have thus been guilty of a double default — first, in supplying a defective pipe; and secondly, in sending gas through it in quantities calculated to produce the catastrophe which occurred. The escape of gas was the direct consequence of their breach of contract, and was necessarily dangerous. The action is therefore maintainable, and the plaintiff is entitled to recover substantial damages.

WILLES, BLACKBURN, MELLOR, BRETT, and GROVE, JJ., concurred.

Attorneys for plaintiff: *Chester & Urquhart.*
Attorney for defendants: *Meredith.*

To same effect see *Lannen* v. *Albany Gas Light Company*, 46 Barb., 264; 44 N. Y., 459. In Massachusetts where the gas escapes in the streets instead of a house, see *Holly* v. *Boston Gas Light Company*, 8 Gray, 123.

Feb. 1, 1872.

98] *[IN THE EXCHEQUER CHAMBER.]

CASTLE and another v. PLAYFORD.

Law Reports, 7 Exchequer, 98.

Vendor and Purchaser — Condition Precedent — Receipt of Bills of Lading — Delivery of Cargo — Agreement that Purchaser shall bear Risks and Dangers of the Seas.

The plaintiffs agreed with the defendant to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof, the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20s. a ton of 20 cwt., weighed on board during delivery. The vessel was lost during the voyage by risks and

dangers of the seas, within the meaning of the agreement, and after the receipt by the defendant of the bills of lading. The plaintiffs having brought an action against the defendant to recover the value of the cargo:—

Held, reversing the judgment of the Court below, that the plaintiffs were entitled to recover.

ERROR from the decision of the Court of Exchequer in favor of the defendant on cross-demurrers to declaration and plea (1).

The case was argued by *Philbrick* for the plaintiffs, and *Littler* for the defendant. In addition to the authorities referred to in the court below, *Taylor* v. *Caldwell* (2) was cited.

[WILLES, J., also referred to *Alexander* v. *Gardner* (3), and *Fragano* v. *Long* (4), as being in favor of the plaintiff's contention.]

COCKBURN, C.J. In my opinion our judgment should be in favor of the plaintiffs. I am much disposed to think, though it is not necessary to decide it, that the effect of this contract was, that from the moment the cargo was shipped, and the bill of lading delivered to the defendant, the property passed. I am confirmed in that opinion by the fact that the parties introduced the clause upon which this dispute has arisen, and upon which the present question turns, namely, that from the moment the bills of lading were delivered to the defendant, he should take *upon himself all the risks and perils attendant upon the [99 conveying of the cargo by sea to the port of its destination. It seems to me that when one person says to another, "I will ship the cargo upon your account and hand you the bills of lading, (which are the indicia of the property), and give you the control of it, and you are from that moment to undertake all the risks attendant upon its transfer by sea;" it is very strong evidence that it was intended by the parties that the property in the cargo, with all its risks, should pass. However, I do not think it necessary to decide the case upon that ground — I put it only alternatively. If that is not the construction of the contract, I think the true one is this: "If you, the sellers, will undertake to ship me a cargo of ice, and to forward it by a given vessel to London, and hand me the bill of lading, so that I may have the control over the cargo, and the distribution of it, I will engage, when it arrives, to pay you according to what

(1) Law Rep., 5 Ex., 165, where the pleadings are set out at length.

(2) 3 B. & S., 826; 32 L. J. (Q. B.), 164.

(3) 1 Bing. N. C., 671.

(4) 4 B. & C., 219.

may be its value; and if, in the meantime, while it is upon the seas, it shall perish through the perils of the seas, I will undertake to pay you for it according to what may be estimated to have been its fair value at the time of going down." That I take to be the construction of the contract, and I do not think it was intended to make the stipulation that the cargo should be at the risk of the purchaser contingent upon the fact of the goods arriving or not in this country, which is the proposition contended for on the part of the defendant.

If the first construction that I have been disposed to put upon this contract is right, then, the property having passed, the stipulation as to time and mode of payment seems to have been put in merely with regard to the measure of price; but, as I have observed, I do not think it necessary to rest my view of the case upon that construction of the contract, although I entertain a strong opinion about it. It is enough that the contract is such as would be consistent with the second construction, namely, that the defendant undertook, that if the cargo should be shipped and the bills of lading transferred to him, he would pay for it according to a certain rate; and if it perished, he would pay for it according to what might be a fair estimation of its value at the time it went down.

WILLES, J., concurred.

100] *BLACKBURN, J. My impression is, if it were necessary to decide it now, that the effect of this contract is that the property passed; but I think it is unnecessary to decide the matter. The parties in this case have agreed, whether the property passed or not, that the purchaser should, from the time he received the bills of lading, take upon himself all risks and dangers of the seas; and, according to Mr. Littler's construction, I do not see what risk he took upon himself at all, unless it was this — that he said, "If the property perishes by the dangers of the seas, I shall take the risk of having lost the property, whether it be mine or not."

The difficulty in the court below arose in reference to the alteration of the time of payment. No doubt it was afterwards provided that payment should be made on the ship's arrival and according to what was delivered. Now here, the ship and

cargo have gone to the bottom of the sea; but in the cases of *Alexander* v. *Gardner* (1), and *Fragano* v. *Long* (2), it was held, that if the property did perish before the time for payment came, the time being dependent upon delivery, and if the delivery was prevented by the destruction of the property, the purchaser was to pay an equivalent sum. In the present case, when the ship went down there would be so much ice on board, and, in all probability, upon an ordinary voyage so much would have melted; and what the defendant has taken upon himself to pay is the amount which, in all probability, would have been payable for the ice. It would be the same amount as on an open insurance; and, doubtless, the merchants, in inserting this clause, were considering who were to pay the premiums of insurance for insuring the cargo, and the defendant seems to have said, "As soon as the bills of lading come to me, I will pay the premiums, or stand my own insurer." I am, therefore, of opinion that the judgment below should be reversed.

Mellor, Brett, and Grove, JJ., concurred.

Judgment reversed.

Attorneys for plaintiffs; *Lumley & Lumley.*
Attorney for defendant: *E. C. Morley.*

Feb. 3, 1872.

*[In the Exchequer Chamber.] [101

Moule v. Garrett and others.

Law Reports, 7 Exchequer, 101.

Assignment of Lease — Liability of ultimate Assignee to indemnify original Lessee against Breach of Covenant.

An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy; and that obligation is not affected by the covenants which the assignee may have made with his immediate assignor.

The plaintiff was lessee of certain premises under a lease containing a covenant to keep in repair. He assigned the lease to B., who assigned it to the defendants.

(1) 1 Bing. N. C., 671. (2) 4 B. & C., 219.

The assignment from the plaintiff to B., and from B. to the defendants, contained express covenants with the immediate assignors respectively, to indemnify them against all subsequent breaches. Whilst the defendants were in possession they committed breaches of the covenant to keep in repair, in respect of which the lessor recovered damages from the plaintiff. In an action to recover over these damages against the defendants:—

***Held*, affirming the judgment of the Court below, that the plaintiff was entitled to succeed.**

APPEAL from a decision of the Court of Exchequer, making absolute a rule to enter a verdict for the plaintiff.

The action was brought by the original lessee of certain premises, to recover from the defendants, the ultimate assignees of the term, a sum of money which the plaintiff had been compelled to pay to the lessor, in respect of dilapidations which occurred during the tenancy of the defendants.

At the trial a verdict was entered for the defendants, with leave to the plaintiff to move to enter a verdict for him for 75*l.*, if the Court should be of opinion that, upon the evidence, he was entitled to succeed. This rule was obtained, and was, after argument, made absolute by the Court of Exchequer (Channell and Pigott, BB.; Cleasby, B., dissenting). (1) The defendants appealed.

The facts and pleadings are fully stated in the report of the case in the court below.

R. D. Bennett (*Manisty, Q.C.*, with him), for the defendants. In order to make a defendant liable upon a covenant, there must be either privity of contract or privity of estate with the plaintiff: 102] *Platt on Covenants, p. 493. Here the defendants were liable to their assignor by virtue of privity of contract, and to the lessor by virtue of privity of estate; but between them and the plaintiff there is privity neither of contract nor of estate. The authorities on which the plaintiff relies are the dictum in *Wolveridge* v. *Steward* (2) and the case of *Burnett* v. *Lynch*. (3) But the latter case differs from this in the essential circumstance, that there the defendant was the immediate assignee of the plaintiff, and the decision is founded upon this fact: see per Abbott, C.J., and Bayley, J. (4)

[BLACKBURN, J. That certainly cannot be said of the judg-

(1) Law Rep., 5 Ex., 132.
(2) 1 C. & M., at p. 659.
(3) 5 B. & C., 589.
(4) 5 B. & C., at pp. 601, 604.

ments of Holroyd and Littledale, JJ. (1); and the reasoning of all the judgments is quite as applicable where the defendant takes from the plaintiff through mesne assignments as where he takes directly.]

The reasoning would also apply to the case of an under-lessee.

[BLACKBURN, J. No; because the under-lessee has never come under any obligation to the lessor; but here the defendant, by taking the same estate which the plaintiff had, has become liable to the same obligation.]

It was for the plaintiff to protect himself by taking proper covenants from his assignee; and he has in fact taken such covenants from Bartley.

[BLACKBURN, J. That is a very imperfect remedy; the immediate assignee may become bankrupt.]

If the plaintiff's contention is well founded an ultimate assignee might become liable, who had expressly entered into limited covenants with his assignor.

[BLACKBURN, J. Why not? How can he alter his obligation to the lessee by his contract with another person? He cannot protect himself from liability to the lessor; why should he any the more be able to protect himself from liability to the lessee?]

To maintain the plaintiff's claim it must be shown that he is surety for the defendants; that is the ground on which it is put in the dictum in *Wolveridge* v. *Steward*. (2) But his position is not that of surety, for he is the person originally liable to the lessor.

*[WILLES, J. Nevertheless he comes within the general [103 principle, that where two persons are under an obligation to the same performance, though by different instruments, if both share the benefit which forms the consideration they must divide the burden; if one only gets the benefit he must bear the whole: *Dering* v. *Earl of Winchilsea*. (3)

BLACKBURN, J. *Humble* v. *Langston* (4) was later than *Wolveridge* v. *Steward* (5), and it therefore adds weight to the dictum in the latter case, especially as Parke, B., who delivered the judgment in *Humble* v. *Langston* (4) was a member of the Court which decided *Wolveridge* v. *Steward*. (5)]

(1) 5 B. & C., at pp. 606, 608.
(2) 1 C. & M., at p. 659.
(3) 2 B. & P., 270.
(4) 7 M. & W., 517.
(5) 1 C. & M., 644.

Cole, Q.C. (*Merewether* with him), for the plaintiff, cited *Penley* v. *Watts* (1) and *Neale* v. *Wyllie.* (2) [He was stopped.]

COCKBURN, C.J. I am of opinion that the judgment of the Court of Exchequer is right, and that it must be affirmed. The defendants are the ultimate assignees of a lease, and the plaintiff, who is suing them for indemnity against the consequence of a breach of a covenant contained in that lease, is the original lessee. There is no doubt that the breach of covenant is one in respect of which the defendants, as such assignees, are liable to the lessor, and that they have acquired by virtue of mesne assignments the same estate which the plaintiff originally took. And I think that taking this estate from the assignee of the plaintiff, their own immediate assignor, they must be taken to have acquired it, subject to the discharge of all the liabilities which the possession of that estate imposed on them under the terms of the original lease, not merely as regards the immediate assignor, but as regards the original lessee.

Another ground on which the judgment below may be upheld, and, as I think, a preferable one, is that, the premises which are the subject of the lease being in the possession of the defendants as ultimate assignees, they were the parties whose duty it was to perform the covenants which were to be performed upon and in respect of those premises. It was their 104] immediate duty to keep *in repair, and by their default the lessee, though he had parted with the estate, became liable to make good to the lessor the conditions of the lease. The damage therefore arises through their default, and the general proposition applicable to such a case as the present is, that where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid. This doctrine, as applicable to cases like the present, is well stated by Mr. Leake in his work on Contracts, p. 41: "Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."

(1) 7 M. & W., 601, 608. (2) 3 B. & C., 533.

Whether the liability is put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference: it is such a duty as the law will enforce. The lessee has been compelled to make good an omission to repair, which has arisen entirely from the default of the defendants, and the defendants are therefore liable to reimburse him.

WILLES, J. I am of the same opinion, on the ground that where a party is liable at law by immediate privity of contract which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant; the former is entitled to be indemnified by the latter in respect of the performance of the obligation.

BLACKBURN, J. I am of the same opinion, for the reasons given by my Brother Channell in the court below.

MELLOR, BRETT, and GROVE, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Robinson & Preston.*
Attorney for defendant: *H. D. Roberts.*

An assignee is not liable without assignment. *Townsend* v. *Scholey*, 42 express covenant for a breach before the N. Y., 18.

February 4, 5, 1872.

*[IN THE EXCHEQUER CHAMBER.] [105

Law Reports, 7 Exchequer, 105.

PICKWELL v. SPENCER and Others.

Will before 1838—*Fee given without Words of Limitation.*

By a will, dated before 1838, the testator gave lands to his wife without words of limitation. He also made her executrix and general legatee. And (1) he provided that if his wife should marry again, an inventory should be taken of all the land, goods, &c., before mentioned by certain persons, whom he appointed

guardians of his children, with power to take away the goods, &c., and to "reserve" them and the land for the benefit of his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole, and divide the proceeds equally amongst his surviving children; (2) he directed that "my executrix shall pay my eldest son W. P. the sum of 5*l.* a year for wages so long as he shall continue to labor on the farm after my decease:"—

Held, affirming the judgment of the Court below, that the widow took the fee.

By Cockburn, C.J., Willes, and Grove, JJ., on the ground that clause 1 disclosed an intention that she should take the fee, subject to the limitation over on her marrying again.

By Blackburn, J., on the ground that the direction to pay 5*l.* a year to W. P. in clause 2 enlarged the estate to a fee.

By Mellor and Brett, JJ., on both grounds.

ERROR brought by the plaintiff upon the judgment of the Court of Exchequer in favor of the defendants, on a special case stated in an action of ejectment.

The plaintiff claimed copyhold land as customary heir to Matthew Pickwell, who, by his will dated the 26th of March, 1821, devised as follows:—"I give and bequeath to my beloved wife, Mary Pickwell, all those my copyhold closes, which I have surrendered to the use of my will, situate, &c. I also give and bequeath to my said wife, Mary Pickwell, all the land which may fall to the said closes by the inclosure of the High Moor. Also I give and bequeath to my said wife, Mary Pickwell, all my money, goods, chattels, and effects, of what nature or kind soever and wheresoever the same shall be at the time of my decease. And I do nominate, &c., my said wife executrix of this my last will." The testator then directed that "if my said wife, Mary Pickwell, marry again," an inventory should be taken of all the land, goods, &c., before mentioned by certain persons, whom he appointed guardians of his children, with power to
106] take away the goods, chattels, and *effects, and to "reserve" them and the land for the benefit of his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole and divide the proceeds "equally amongst my surviving children. It is also my will that my executrix shall pay my eldest son, William Pickwell, the sum of 5*l.* a year for wages as long as he shall continue to labor on the farm after my decease."

The testator died shortly after making his will. In 1832 Mary Pickwell sold the lands in question to Richard Snow, who

died in 1857, having devised them to trustees for his wife during her life, and after her death to the defendants, as tenants in common.

Richard Snow's widow died, and the defendants were admitted in 1865.

Mary Pickwell died in 1870, without having married again. The question for the opinion of the Court was, whether Mary Pickwell took any larger estate in the land than a life estate.

The Court below gave judgment for the defendants ([1]), and the plaintiff brought error.

Field, Q.C. (*J. J. Aston* with him), for the plaintiff. It cannot have been the intention of the testator to put it in the power of his wife to alienate this property, which he has expressly limited over in the event of her marriage.

[BLACKBURN, J. The title of the purchaser would be a defeasible title.]

The evidence of intention to benefit his children by the devise is so strong that it cannot be supposed the testator should be willing that in any case the land should be alienated from them.

[COCKBURN, C.J. But by your construction the testator will not benefit his children in the event which has happened, but will only benefit his heir.

GROVE, J. In effect the testator disinherits his heir if his wife marries, but not if she dies.]

It is not necessary for the plaintiff to show an intention not to confer an estate in fee on the widow; on the contrary, it is for those claiming under her to show an intention to disinherit the heir. Two grounds are relied on in favor of the defendants. *First, it is contended that the limitation over in the event [107 of marriage implies a gift of the fee in the alternative event. But this is an inference only made where the one alternative is that of death under twenty-one; and the rule is not extended to any other cases: 2 Jarman on Wills, 3d ed., p. 251. [*Field* also argued, on the authority of *Browne* v. *Hammond* ([2]), that a limitation over of the fee to "the trustees for the benefit of all the children," was to be implied upon the death of the widow unmarried; but the Court pointed out that the case had no application, for that there the first limitation was expressly of

([1]) Law Rep. 6 Ex., 190. ([2]) Johns., 210.

an estate durante viduitate; and it was suggested that, even if it applied, the heir would have no title to maintain this action, and Willes, J., referred to *Brown's Case* (1).] Secondly, and this is the ground relied on in the judgment of the Court below, it is contended that the direction to the widow to pay 5*l.* a year to William Pickwell enlarges her estate to a fee. But this is not so, for the charge is not on her as devisee, but on her as executrix; it is in terms a direction to his "executrix," and the accident that his executrix is also his devisee will not suffice to support the inference: 2 Jarman on Wills, 3d ed., p. 249; Hawkins on Construction of Wills, p. 134. He also referred to *Roe* v. *Blackett* (2); *Lloyd* v. *Jackson* (3); *Moone* v. *Heaseman* (4).

Manisty, Q.C. (*F. M. White* with him), for the defendants, was stopped.

COCKBURN, C.J. I am of opinion that the judgment of the Court below should be affirmed; but I cannot say that I come to that conclusion upon the same grounds as those on which the judgment below proceeded. I cannot bring my mind to be satisfied that in that part of the will which provides that the testator's executrix shall pay the sum of 5*l.* yearly to his son, the words amount merely to a designatio personæ. I quite agree with the proposition stated in 2 Jarman on Wills, 3d ed., p. 249, that if there is a devise which would operate only as a devise for life, but a pecuniary charge is attached to the devise, the fact that the devisee on whom the charge is imposed in his character of devisee is afterwards appointed executor, will not 108] make the payment a *payment by him as executor, and the devise will therefore enure to his benefit so as to enlarge the fee. But the case differs where the direction to pay is given not to the devisee as such, but to the devisee under the name of executor; there the charge seems rather imposed on him quâ executor, and not quâ devisee.

But, construing this will as a whole, I am of opinion that the true construction is, that it gives an estate in fee to Mary Pickwell. No doubt, in a will prior to 1838, if there are no words to indicate the nature of the interest given, a devisee will

(1) 4 Rep. 21 a. (No. 1 of the *Copyhold Cases*).
(2) 1 Cowp., 235.
(3) Law Rep., 2 Q. B., 269.
(4) Willes, 138.

take only an estate for life; but, on the other hand, the rule is equally well established, that if you can gather from the rest of the will that the testator did not intend to give merely an estate for life, the gift will be enlarged to a fee. Now here the intention of the testator manifestly was that his wife should remain single. According to the plaintiff's construction the youngest son would, in that event, have taken the whole of the realty as customary heir, to the exclusion of the other children. But it is quite plain that in the disposition of his property, which the testator proposed to make in the event of his wife marrying again, he meant to distribute the property among all his children, share and share alike. This then was the distribution which he desired to take effect, and it cannot be doubted that this was also what he desired and expected his wife to do in the event of her remaining single, and so having no collateral or sinister influence brought to bear upon her in the distribution of the family estate. Nothing is more common than for a man to leave his property in the first instance absolutely to his wife, trusting to her to make such a disposition of it in after years, with reference to the state of things which may then have supervened, as he would have made if he survived her, securing his family at the same time against the possibility of her putting herself into a condition where she cannot be safely trusted to perform that duty. That is what the testator here intended. He meant to leave to his wife the entire disposition of the property, in such manner and under such conditions as she thought fit; but, in the event of her marrying again, he makes himself such a disposition as he trusted she would have made if she had remained single. That being his manifest intention, it would be entirely defeated if the wife took only an estate for life, in which event his heir would, upon *her death without [109 marrying, get the whole. Therefore, although the devise to the wife is without words of limitation, yet on the whole will it is evidently intended that she shall take an estate in fee, subject only to be divested upon the event of her marrying again.

WILLES, J. I am of the same opinion.

BLACKBURN, J. I also am of opinion that the judgment should be affirmed. The case has been argued on several

grounds, but I rest my judgment on one only. Upon the others, if it were necessary, I should desire time to inquire further into the authorities. The will being prior to 1838, it is well established that, the devise being of the land only, without words of limitation, the devisee would primâ facie take for life only; but it is equally well established that, when a devise of lands is made in this form, and the testator proceeds to express an intention that the object of his bounty should pay a sum of money, his having imposed on the object of his bounty a charge which, if only a life estate were given, would be a loss, affords a sufficient indication of his intention that the devisee should take not for life, but in fee. And this is obviously just where the value of the life estate would be small in proportion to the amount of the charge. But it is also established that the Court will not take into consideration the proportion of value of the life estate and the charge; and whatever the ground of this may have been originally, there is one very satisfactory reason for it. In matters of conveyancing it is a great object to make the law such that men may know whether they have a good or a bad title; and if they had to inquire whether the charge imposed by the will upon the devisee through whom they claim was large or small in proportion to the value of the life estate, no one claiming under such a devisee could be certain of his title. Therefore, for the security of title, there is good reason for holding that this is not to be taken into account.

The argument, however, fails if the gift is simply a legacy; and if Mr. Field could have persuaded me that the gift of 5*l.* yearly to William Pickwell was a mere legacy, which he would get only out of the personal assets, and the payment of which was not charged personally on the widow, I should agree that this gift would not affect the devise. But I cannot construe 110] the will so. The testator *devises and bequeaths everything to his wife, and then makes her his executrix. He afterwards directs that his "executrix" shall pay this sum of money yearly to his son. I think the word "executrix," as here used, is merely a description of his wife, and that the yearly sum of 5*l.* is a charge upon her personally, and not a legacy to be paid out of his personal estate. It follows that the estate given to her is enlarged to a fee.

MELLOR, J. I am of the same opinion, both on the ground stated by my Brother Blackburn, and relied upon in the court below; And also because I agree that, for the reasons assigned by the Lord Chief Justice, it was the manifest intention of the testator to pass the fee to his wife.

BRETT, J. I think the judgment should be affirmed on both grounds. The will discloses an intention on the part of the testator to benefit all his children, and one mode in which he seeks to protect their interests is by preventing his wife from marrying again. But if Mr. Field's argument is correct, this result would follow, that it would be more to the benefit of his children that she should marry than that she should not.

On the other ground also I think the estate is enlarged to a fee. The property being given without words of limitation, a charge is afterwards imposed on the executrix; but it seems to me that that charge is imposed on her in consequence of the devise to her of the copyhold lands, which we must take to have formed a part of the farm. That also shows that his wife was intended to take the fee.

GROVE, J. I agree. There is an inconsistency upon the one construction, and not upon the other. The testator has provided for all his children in the event of his wife's marrying, but not in the event of her dying unmarried. If he meant that, in that event, the heir should take all, there would be an inconsistency in his intention. But it is consistent that he should leave his wife to provide for that event; and this is more probable than that he should have had an inconsistent intention.

Judgment affirmed.

Attorneys for plaintiff: *Swann & Co.*
Attorneys for defendants: *Borrett, White & Borrett.*

Feb. 8, 1872.

111] *[IN THE EXCHEQUER CHAMBER.]

FROST v. KNIGHT.

Law Reports, 7 Exchequer Reports, 111.

Breach of Promise of Marriage — Breach of Contract by refusal to perform, the Time for Performance not having arrived.

The defendant promised to marry the plaintiff so soon as his (defendant's) father should die. During the father's lifetime the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of the promise, the defendant's father being still alive.

Held, reversing the judgment of the Court below, that the principle of *Hochster* v. *De la Tour* (2 E. & B., 678; 22 L. J. (Q.B.), 455) was applicable to the case of such a promise to marry, and that a breach of contract had been committed on which the plaintiff could sue.

ERROR on a judgment of the Court of Exchequer (Kelly, C.B., and Channell, B.; Martin, B., dissenting), arresting the judgment after a verdict for the plaintiff. The facts and pleadings in the case are stated in the judgment of the Lord Chief Justice, and more fully in the report of the case below. (1)

June 20, 21, 1871. The case was argued by

Hill, *Q.C.* (*Dodd* with him), for the plaintiff.

Powell, *Q.C.* (*Streeten* with him), for the defendant.

The same arguments were used and cases cited as in the court below.

Cur. adv. vult. (2)

Feb. 8, 1872. The following judgments were delivered: —

COCKBURN, C.J. (3). This case comes before us on error, brought on a judgment of the Court of Exchequer arresting the judgment in the action on a verdict given for the plaintiff.

The action was for breach of promise of marriage. The promise, as proved, was to marry the plaintiff on the death of the defendant's father. The father still living, the defendant

(1) Law Rep., 5 Ex., 322.

(2) The case was heard before Cockburn, C.J., and Byles, Montague Smith, Keating, and Lush, JJ.; but before the judgment was delivered Montague Smith, J., had ceased to be a member of the Court.

[3] In this judgment Keating and Lush, JJ., concurred.

announced his intention of not fulfilling his promise on his father's death, and broke off the engagement, whereupon the plaintiff, without waiting for *the father's death, at [112 once brought the present action. The plaintiff having obtained a verdict, a rule nisi was applied for to arrest the judgment, on the ground that a breach of the contract could only arise on the father's death, till which event, no claim for performance could be made, and, consequently, till its occurrence, no action for breach of the contract be maintained. A rule nisi having been granted, a majority of the Court of Exchequer concurred in making it absolute, Martin, B., dissenting; and the question for us is, whether the judgment of the majority was right.

The cases of *Lovelock* v. *Franklyn* (1) and *Short* v. *Stone* (2), which latter case was an action for breach of promise of marriage, had established that where a party bound to the performance of a contract at a future time puts it out of his own power to fullfil it, an action will at once lie. The case of *Hochster* v. *De la Tour* (3), upheld in this court in the *Danube and Black Sea* Co. v. *Xenos* (4) went further, and established that notice of an intended breach of a contract to be performed in futuro had a like effect.

The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster* v. *De la Tour* (3) and *The Danube and Black Sea Co.* v. *Xenos* (4) on the one hand, and *Avery* v. *Bowden* (5), *Reid* v. *Hoskins* (6), and *Barwick* v. *Buba* (7) on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any

(1) 8 Q. B., 371.
(2) 8 Q. B., 358.
(3) 2 E. & B., 678; 22 L. J. (Q. B.), 455.
(4) 13 C. B. (N. S.), 825; 31 L. J. (C. P.), 284.
(5) 5 E. & B., 714; 26 L. J. (Q. B.), 3.
(6) 6 E. & B., 953; 26 L. J. (Q. B.), 5.
(7) 2 C. B. (N. S.), 563; 26 L. J. (C. P.), 280.

supervening circumstance which would justify him in declining to complete it.

113] *On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.

Considering this to be now settled law, notwithstanding any thing that may have been held or said in the cases of *Philpotts* v. *Evans* (1) and *Ripley* v. *McClure* (2), we should have had no difficulty in applying the principle of the decision in *Hochster* v. *De la Tour* (3), to the present case, were it not for the difference which undoubtedly exists between that case and the present, viz., that, whereas there the performance of the contract was to take place at a fixed time, here no time is fixed, but the performance is made to depend on a contingency, namely, the death of the defendant's father during the lifetime of the contracting parties. It is true that in every case of a personal obligation to be fulfilled at a future time, there is involved the possible contingency of the death of the party binding himself, before the time of performance arrives; but here we have a further contingency depending on the life of a third person, during which neither party can claim performance of the promise. This being so, we thought it right to take time to consider whether an action would lie before the death of the defendant's father had placed the plaintiff in a position to claim the fulfilment of the defendant's promise.

After full consideration we are of opinion that, notwithstanding the distinguishing circumstance to which I have referred, this case falls within the principle of *Hochster* v. *De la Tour* (3), and that, consequently, the present action is well brought.

The considerations on which the decision in *Hochster* v. *De la Tour* (3) is founded are that the announcement of the contracting party of his intention not to fulfil the contract amounts to a breach, and that it is for the common benefit of both parties

(1) 5 M. & W., 475.
(2) 4 Ex., at p. 359.
(3) 2 E. & B., 678; 22 L. J. (Q. B.), 455.

that the contract shall be taken to be broken as to all its incidents, *including non-performance at the appointed time; [114 as by an action being brought at once, and the damages consequent on non-performance being assessed at the earliest moment, many of the injurious effects of such non-performance may possibly be averted or mitigated.

It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is — and the decision in *Hochster* v. *De la Tour* (1) proceeds on that assumption — a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy may be essential to his interests. His rights acquired under it may be dealt with by him in various ways for his benefit and advantage. Of all such advantage the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract, and bring his action accordingly.

The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.

It is obvious that such a course must lead to the convenience of both parties; and though we should be unwilling to found our opinion on grounds of convenience alone, yet the latter tend

(1) 2 E. & B., 678; 22 L. J. (Q.B.), 455.

strongly to support the view that such an action ought to be admitted *and upheld. By acting on such a notice of the intentionof the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the non-fulfilment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished. 115]

It appears to us that the foregoing considerations apply to the case of a contract the performance of which is made to depend on a contingency, as much as to one in which the performance is to take place at a future time; and we are, therefore, of opinion that the principle of the decision *Hochster* v. *De la Tour* (1) is equally applicable to such a case as the present.

It is next to be observed, that the law as settled by *Hochster* v. *De la Tour* (1) and *Danube and Black Sea Company* v. *Xenos* (2) is obviously quite as applicable to a contract in which personal status or personal rights are involved, as to one relating to commercial or pecuniary interests. Indeed, the contract of marriage appears to afford a striking illustration of the expediency of holding that an action may be maintained on the repudiation of a contract to be performed in futuro. On such a contract being entered into, not only does a right to its completion arise with reference to domestic relations and possibly pecuniary advantages, as also to the social status accruing on marriage, but a new status, that of betrothment, at once arises between the parties. This relation, it is true, has not, by the law of England, the same important consequences which attached to it by the canon law and the law of many other countries. Nevertheless, it carries with it consequences of the utmost importance to the parties. Each becomes bound to the other; neither can, consistently with such a relation, enter into a similar engagement with another person; each has an implied right to have this relation continued till the contract is finally accomplished by marriage. To the woman, more especially, it is all-important that the relation shall not be *put an end to. Independently of the mental pain occasioned by the abrupt termination 116]

(1) 2 E. & B. 678; 22 L. J. (Q.B.), 455. (2) 13 C. B. (N.S.), 825; 31 L. J. (C. P.). 284.

of such an engagement, the fact of its existence, if followed by such a termination, must necessarily operate to her serious disadvantage. During its continuance others will naturally be deterred from approaching her with matrimonial intentions; nor could she admit of such approaches, if made; while the breaking off of the engagement is too apt to cast a slur upon one who has been thus treated. We see, therefore, every reason for applying the principle of *Hochster* v. *De la Tour* (1) to such a case, and for holding the contract, if repudiated, to be broken, not only in its present, but also in its ultimate obligations and consequences. To hold that the aggrieved party must wait till the time fixed for marrying shall have arrived, or the event on which it is to depend shall have happened, would have the effect of aggravating the injury, by preventing the party from forming any other union, and by reason of advancing age rendering the probability of such a union constantly less. It has been suggested, indeed, that the desire of marrying and the happiness to be expected from it diminish with advancing years, and, therefore, that when by the terms of the contract marriage is only to take place at a remote time, the value of the marriage and the damages to be recovered for a breach of the promise would be less if the refusal were made when the time for marrying was accomplished; and that, consequently, an action ought not to be allowed till the time when the fulfilment of the contract could have been claimed. We cannot concur in this view. We think that, in estimating the amount of injury done and of the compensation to be made for it, if the contract were broken when the time for marrying had arrived, the wasted years and the impossibility of forming any other engagement during the intermediate time should be taken into account, and not merely the age of the parties and the then existing value of the marriage. It is, therefore, manifest that it is better for both parties — for the party intending to break the contract, as well as for the party wronged by the breach of it — that an express repudiation of the contract should be treated as a violation of it in all its incidents, and should give the right to the party wronged to bring an action at once, and have the damages *assessed at the earliest moment. No one can doubt that, [117. morally speaking, a party who determines to break off a matri-

(1) 2 E. & B. 678; 22 L. J. (Q.B.), 455.

monial engagement acts far more commendably if he at once gives notice of his intention, than if he keeps that intention secret till the time for fulfilling the promise has come. The reason is, that the giving such notice at the earliest moment tends to mitigate, while the delay in giving it necessarily aggravates, the injury to the party wronged.

It has been urged that there must be great difficulty in thus assessing damages prospectively. But this must always be more or less the case whenever the principle of *Hochster* v. *De la Tour* (1) comes to be applied. It would equally exist where one of the parties, by marrying another person, gave rise, as in the case of *Short* v. *Stone* (2), to an immediate right of action. It cannot be said that the difficulty is by any means insuperable, and the advantages resulting from the application of the principle of *Hochster* v. *De la Tour* (1) are quite sufficient to outweigh any inconvenience arising from the difficulty of assessing the damages.

We are struck by the fact that the Lord Chief Baron, while holding that the present action would not lie, expressed an opinion that the wrong done by the repudiation of a contract of marriage might be made the foundation of an action on the case, in which the facts should be set forth. But as the rights and obligations of the parties arise here entirely out of the contract, we have a difficulty in seeing how such an action could be maintained. But be that as it may, as in such an action as is thus suggested the damages would have to be ascertained with reference to the same facts and the same considerations as in an action brought on the contract, it seems to us by far the simpler course, the case being, as it seems to us for the reasons we have given, clearly within the decision in *Hochster* v. *De la Tour* (1), to hold that the present action for breach of the contract may be maintained, and that in it the plaintiff is entitled to recover damages in respect of the non-fulfilment of the promise as though the death of the defendant's father—the event on which the fulfilment was to depend—had actually occurred.

We are therefore of opinion that the judgment of the Court of Exchequer must be reversed.

118] *Byles, J. I think the plaintiff below entitled to recover, both on principle and on authority, but as my judgment was

(1) 2 E. & B., 678; 22 L. J. (Q.B.), 455. (2) 8 Q.B., 358.

prepared before I had the advantage of seeing that of the Lord Chief Justice, and as this is a case of great importance, I think I ought to deliver it.

An express pre-contract of marriage, as already suggested by the Lord Chief Justice, places the man and woman in the condition or status of betrothment. In this state there are certain mutual duties. The woman, for example, may not, without a breach, marry another man, although it is possible that he may die before the future day appointed for the first intended marriage, whether already fixed, or whether contingent on a future event. So I conceive the man cannot, during the stipulated period of betrothment, without a breach of contract, marry another woman, though she may die in the mean time. So, for one of the parties to break off the mutual engagement by an express refusal to perform it, though before the day, seems to me to be equally a breach of the contract, for it puts an end to the condition of betrothment which, according to the contract, was to continue. In each of these three cases there is a repudiation of the duties springing from the new relation involved in the contract.

But, independently of the peculiarities attending a pre-contract of marriage, the decision in *Hochster* v. *De la Tour* (1) shows that in the analogous case of a pre-contract for future service, the refusal of one of the parties to perform the contract, though before the time appointed for its fulfilment, is a breach. And the decision in that case goes further than is necessary for our decision in this case. For there no status had been established like that involved in a pre-contract of marriage.

But the Court of Common Pleas, in the case of *Wilkinson* v. *Verity* (2), and the Court of Error, in *Danube and Black Sea Company* v. *Xenos* (3), affirming the judgment of the Court below, have laid it down that an absolute unconditional renunciation of a contract before the time of performance amounts to a breach though only at the election of the promisee.

Judgment reversed.

Attorneys for plaintiff: *Pitman & Lane.*
Attorneys for defendant: *Austen, De Gex, & Harding.*

(1) 2 E. & B., 678; 22 L. J. (Q. B.), 455. (2) Law Rep., 6 C. P., 206.
(3) 13 C. B. (N. S.), 825; 31 L. J. (C. P.), 284.

To the same effect *Burtis* v. *Thompson*, 42 N. Y., 246.

*CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

MICHAELMAS TERM, XXXV VICTORIA.

Nov. 18, 1871.

334] THE QUEEN v. HOLMES and FURNESS.

Law Reports, 1 Crown Cases Reserved, 334.

Indecent Assault — Attempt at Rape — Cross-examination of Prosecutrix — Previous Connection with other Men — Contradiction — Evidence.

The prosecutrix in an indictment for an indecent assault, which on the facts alleged amounted, in substance, to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it:—

Held, that she could not be contradicted.

CASE stated by the Chairman of Quarter Sessions for the county of Surrey.

At the general quarter sessions, holden at Kingston-upon-Thames, for the county of Surrey, on the 17th of October, 1871, Henry Holmes and Joseph Frederick Furness were tried upon an indictment charging them with indecently assaulting one Sarah Palmer.

It appeared from the evidence taken at the trial, the whole of which was set out, that the indecent assault charged amounted to an attempt at rape; and that for the defense consent was alleged.

The prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it.

The prisoner's counsel called Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the

counsel *for the prosecution objected to the question on [335 the authority of *Reg.* v. *Cockroft* (1), and the Court refused to allow the question to be answered, but reserved the point, whether such answer ought to have been allowed to be given, for the decision of the Court for Crown Cases Reserved.

The jury found both prisoners guilty.

Straight, for the prisoners. The issue in this case being substantially one of consent or no consent, the evidence tendered was strictly relevant to the issue, as having a material bearing upon the probability of the prosecutrix's consent. *Rex* v. *Hodgson* (2), which may be relied on upon the other side, is not in point. In that case it was held that the prosecutrix was not bound to answer a question as to previous connection with another man; a rule which may be doubted in the present day. And, inasmuch as the question was not answered by the prosecutrix, the evidence on the other side was not, as here, called in contradiction. *Reg.* v. *Robins* (3) is an express decision by Coleridge, J., with the concurrence of Erskine, J., that the evidence is admissible. In *Rex* v. *Martin* (4), the same rule was laid down as to evidence of previous connection with the prisoner. And there is no reason for any distinction between the two cases. *Rex* v. *Barker* (5), and *Reg.* v. *Clay* (6), show that evidence of previous immorality is material to the issue. He also referred to *Reg.* v. *Arnall* (7), and *Reg.* v. *Eyre* (8).

Oppenheim for the prosecution. The evidence was properly excluded. The question put to the prisoner was not relevant to the issue, it only went to credit. Upon principle, therefore, her answer is binding. And *Rex* v. *Hodgson* (2) is a decision of all the judges against the admission of the evidence. *Rex* v. *Clarke* (9) is to the same effect. The ruling in *Reg.* v. *Robins* (3) was wrong. And in *Reg.* v. *Cockroft* (1), Martin, B., and Willes, J., refused to follow it, and laid down the contrary rule. He also referred to a ruling of Keating, J., in a case not reported, to the same effect.

(1) 11 Cox, Cr. C., 410.
(2) R. & R., 211.
(3) 2 Moo. & R., 512.
(4) 6 C. & P., 562.
(5) 3 C. & P., 589.
(6) 5 Cox, Cr. C., 146.
(7) 8 Cox, Cr. C., 439.
(8) 2 F. & F., 579.
(9) 2 Stark., N. P. C., 241.

336] *KELLY, C.B. The question raised in this case is one of very great importance; and if we had entertained any substantial doubt upon it, we should have thought it right to submit it for the opinion of all the judges. But when we look, first, at the principles applicable to the case, and, secondly, at authority, we think it is impossible to doubt what the decision ought to be. The question is, whether on an indictment for rape, or for attempt at rape, or for an indecent assault, amounting in substance to an attempt at rape, if the prosecutrix is asked in cross-examination whether she has had connection with another person not the prisoner, and denies it, evidence can be called to contradict her. We are all of opinion that it cannot. In the first place, the general rule of evidence is that if a question be put in cross-examination as to a collateral point, the answer must be taken for better or for worse. And the reason is obvious. If such evidence as that here proposed were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice. Upon principle, therefore, we must hold that the answer is binding.

When we look at the authorities the case is still clearer. The first case on the subject is *Rex* v. *Hodgson* (1). That case was heard first before eight of the judges, and afterwards before the whole number. It was an actual decision that the prosecutrix on a charge of rape was not bound to answer such a question as that here put. That seems, as a matter of principle, to involve that, if the question had been answered, the answer would have been binding. But, further, the second objection taken in that case seems to raise the very point; and upon that the judges lay down the law distinctly, in accordance with the view which we take. That case is therefore an actual decision involving in principle the point now in question, and a dictum, at the least, by some of the most learned judges who ever sat, upon the very point. *Reg.* v. *Cockroft* (2) was an indictment for 337] *rape, and was tried first before Martin, B., and again before Willes, J., and both of those learned judges held that

(1) R. & R., 211. (2) 11 Cox, Cr. C., 410.

such evidence as that here tendered was inadmissible. So far all the decisions entirely support that view which we think to follow clearly from the settled principles of the law of evidence. We are asked to abandon that view upon the authority of *Reg.* v. *Robins.* (1) That was no doubt a decision of Coleridge, J., after consulting Erskine, J., upon the very point now in dispute. But we cannot follow that ruling in opposition to the whole current of authority upon the question. In *Rex* v. *Barker* (2) the question was as to evidence showing the prosecutrix to be a common prostitute; and such evidence has long been held material. In *Rex* v. *Martin* (3) the evidence was as to the prosecutrix having previously had connection with the prisoner. And such evidence is undoubtedly admissible, for it has a direct bearing upon the question of consent. These are really all the cases upon the subject. But from *Rex* v. *Clarke* (4) it may be collected that Holroyd, J., held the same view in the case of an indictment for an attempt at rape. We have, therefore, a deliberate judgment of the twelve judges, the decisions of Martin, B., and Willes, J., and the opinion of Holroyd, J., against the ruling of Coleridge, J.

Byles, J. I think it quite clear that the prosecutrix in a charge of rape, or attempt at rape, cannot be contradicted by persons who swear that they have had connection with her, for a rape may be committed upon a prostitute. Then we have the authority of all the judges in *Rex* v. *Hodgson* (5); and of Martin, B., and Willes, J., in *Reg.* v. *Cockroft.* (6) A ruling of Keating, J., to the same effect has been referred to. And I have had an opportunity of speaking both to him and to Willes, J., who are still of the same opinion.

Pigott, B. I think the evidence proposed to be given is not relevant to the issue; and its admission might lead to great injustice.

*Lush, J. I was for a time of a different opinion. But [338 I am now quite convinced that the evidence in question was too remote from the issue.

(1) 2 Moo. & R., 512.
(2) 3 C. & P., 589,
(3) 6 C. & P., 562.
(4) 2 Stark. N. P. C., 241.
(5) R. & R., 211.
(6) 11 Cox, Cr. C., 410.

HANNEN, J. I think no distinction can be drawn between a case of rape and a case of indecent assault, when the offence charged is in substance an attempt at rape. Then *Rex* v. *Hodgson* (1) is a decision that such evidence as this cannot be given as substantial evidence in the cause, that is, cannot be regarded as relevant to the issue, but only as going to the credit of the witness. The witness's answer is therefore binding. And the reason is that the prosecutrix cannot come prepared to try all the issues which would be thus raised. The case is clear in principle, and it is also governed by authority.

Conviction affirmed.

Attorneys for prosecution: *J. C. & W. Rogers.*
Attorney for prisoners: *T. W. Bilton.*

To same effect *People* v. *Rector*, 19 Wend., 569; *People* v. *Jackson*, 3 Park Cr. Rep., 391; Roscoe's Crim. Ev., 810, 6th Am. Ed.

Nov. 11.

THE QUEEN v. MANNING and ROGERS.

Law Reports, 1 Crown Cases Reserved, 338.

Malicious Injury to Property — Arson — 24 & 25 Vict. c. 97, s. 6 — Building — Unfinished House.

A building, in 24 & 25 Vict. 97, s. 6, is not necessarily a finished structure.

An unfinished house, of which the walls were built and finished, the roof on and finished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering, *held*, to be a building within the meaning of the section.

CASE stated by Martin, B.

The prisoners were tried upon an indictment, which charged that they "feloniously, unlawfully, and maliciously did set fire to a certain building of one John Rhodes, there situate, against the form of the statute in such case made and provided."

It was framed upon 24 & 25 Vict. c. 97, s. 6 (2). The prisoners

(1) R. & R., 211.

(2) Sect. 6 of 24 & 25 Vict. c. 97, enacts that "Whosoever shall unlawfully and maliciouly set fire to any building, other than such as are in this Act before mentioned, shall be guilty of felony . . . ."

*were members of a society, or union, of Hand-made [339 Brick Makers. The building set fire to was one of seven built in a row, and intended for dwelling-houses, and built in part of machine-made bricks. On the night of the 25th of June, 1871, the prisoners (and some others who escaped) set fire to it by means of paraffin oil. All the walls, external and internal, of the house were built and finished. The roof was on and finished. A considerable part of the flooring was laid. The internal walls and ceilings were prepared ready for plastering. The house was in a forward state towards completion, but was not completed.

At the conclusion of the case for the prosecution, it was objected by the counsel for the prisoners that the erection set fire to was not a building within the meaning of the statute, because it was not completely finished. The learned judge was against the objection, but it was stated that Lush, J., in a similar case, had expressed his intention to reserve the point for the opinion of the Court of Criminal Appeal, and, at the request of the counsel, the learned judge assented to take the same course.

The learned judge took the opinion of the jury, whether, as a question of fact, the erection was a building, and they found that it was. The prisoners were found guilty.

The questions for the opinion of the Court were:—

First: Was the question concluded by the finding of the jury?

Secondly: If it was not, was the objection made by the learned counsel for the prisoners a valid one?

No counsel appeared.

Kelly, C.B. It is to be regretted that we have not had the assistance of counsel in this case, because the point raised is both new and important. We are of opinion that the question having been properly left to the jury, their finding upon it is conclusive.

The building in question, though not completed, was intended to be a house. It was one of a row of seven houses, unfinished it is true, but in a forward state towards completion. Then the question arises whether this is a building within s. 6 of 24 & 25 Vict. c. 97, which makes it felony unlawfully and maliciously to set fire to "any building other than such as are in *this [340

Act before mentioned." As the buildings mentioned in the earlier sections are here referred to, it may be well to see what some of those buildings are. Sect. 3 throws light upon the case.

By that section: "Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malthouse, hopoast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof . . . . shall be guilty of felony." Now the argument may be urged that these several kinds of buildings enumerated in s. 3 are all necessarily completed buildings, but that is not so. Take for example the term "office." That may form only a part of a house; and an office may be completed on the ground floor, while the house above it is not completed. So again with the term "shop." There may well be a shop on the ground floor, with floors above it for lodgings or other purposes. In such a case the office or shop, though only part of a house, could be within s. 3. There is nothing in that section to limit its operation to completed buildings. Still less is there in s. 6. The words of that section are not "any other building," but the larger words, "any building other than such as are in this act before mentioned." I think, therefore, the ruling of the learned judge and the finding of the jury were right; this was a building fairly and substantially within the Act of Parliament. I say nothing as to what extent of partial completion in an unfinished building may be necessary to bring it within the section. I do not say that two or three yards of wall would be a building. But when a house is in the state in which this was, I think it is within the act.

Byles, J. I also think the conviction should be affirmed. It is not necessary to lay down a definition of what is a building. It is sufficient to say that the erection in this case was properly found to be one. Such words as those in the section must be interpreted in their ordinary sense. And it would certainly not have been a departure from ordinary language to have asked, "Who built that structure?" The judge considered it to be a building, and the jury found so; and the decision was right.

*PIGOTT, B. I am of the same opinion. This was not, [341
I think, a house, but it was a building.

LUSH, J. I am of the same opinion. A building need not necessarily be a completed structure; it is sufficient that it should be a connected and entire structure. I do not think four walls erected a foot high would be a building. And my impression is that in the case referred to, tried before me, there were only four walls unconnected, and not advanced further than a short distance towards completion.

HANNEN, J. I am of the same opinion. It is very likely that a house can only mean a structure designed and sufficiently advanced for the habitation of man. But I think the structure in the present case was a building other than a house, and therefore within s. 6.

Conviction affirmed.

Nov. 11.

THE QUEEN v. CHAMBERS.

Law Reports, 1 Crown Cases Reserved, 341.

Forgery — 24 & 25 Vict. c. 98, s. 23 — "Undertaking."

The prisoner, being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I. O. U., purporting to be signed by himself and another, the signature of the latter being forged by the prisoner:—

Held, that the instrument was an "undertaking for the payment of money" within the meaning of 24 & 25 Vict. c. 98, s. 23.

CASE stated by Blackburn, J.

The prisoner was tried on an indictment for feloniously forging an instrument which was set out in the indictment in the words and figures following:—

"November 21st, 1870.
I. O. U. thirty-five pounds
35*l.* Arthur Chambers,
George Wickham."

It was described in one count as an undertaking for the payment of money, and in another as a security.

On the trial, evidence was given that the prisoner having obtained a loan of 35*l.*, and being pressed for payment, obtained
342] further time by giving as a security the instrument which purported to be signed by his brother-in-law, George Wickham.

It was objected that, though, if the instrument had been genuine, it might have been evidence of an account stated by Wickham, from which the law would have implied a promise on his part to pay the money; and so would in effect operate as an undertaking to pay the money, and as a security for its payment, yet it was not in itself either one or other.

The learned judge reserved the point, and left to the jury whether the instrument was forged by the prisoner with intent to defraud.

The verdict was "Guilty."

The question was, whether the instrument in question was either an undertaking or a security within the meaning of 24 & 25 Vict. c. 98, s. 23. (1)

No counsel appeared.

KELLY, C.B. The question in this case is, whether the instrument forged by the prisoner is an "undertaking for the payment of money" within the meaning of 24 & 25 Vict. c. 92, s. 23, so as to make the forgery of it an offence within that section. Now the instrument is in form an I. O. U. for thirty-five pounds, purporting to be signed by the prisoner and his brother-in-law, George Wickham. And it appears from the case that the pri-

(1) Sect. 23 of 24 & 25 Vict. c. 98, enacts that: "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request, for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on, or assignment of, any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony. . . . ." It will be observed that this section does not make it an offence to forge a "security for money," but only to forge "an undertaking, &c., for the delivery, &c., of a security for money." It would appear, therefore, that the second count was not a good count under the section.

soner, being pressed for repayment of a loan, obtained further time by giving this instrument as a security. I am clearly of opinion that such a *security is an undertaking for the [343 payment of money within the meaning of the Act. It may be argued that there was no consideration for such an undertaking. But there was consideration for it. There was the giving of further time to the prisoner to pay the debt, for the payment of which he was being pressed. The instrument is therefore an undertaking for the payment of money given for sufficient consideration. If any doubt could formerly have existed, it has been removed by the Mercantile Law Amendment Act, which makes it unnecessary that the consideration for a guarantee should appear in writing.

BYLES, J. I am of the same opinion.

PIGOTT, B. I think the instrument in question was an undertaking for the payment of money. It does not show the consideration; but that is not necessary. It is a guarantee by Wickham of the prisoner's debt.

LUSH, J. I am of the same opinion. It appears that the prisoner was indebted, and being pressed for payment, obtained further time to pay by giving this instrument as a security. If Wickham had signed it, I think he would have been bound by it, for the consideration need not now appear in writing.

HANNEN, J. I am of the same opinion.

Conviction affirmed.

END OF MICHAELMAS TERM, 1871.

IN THE

COURTS OF PROBATE AND DIVORCE.

Nov. 14, 1871.

300] *GRIFFITHS v. GRIFFITHS and GRIFFITHS.

Law Reports, 2 Probate and Divorce, 300.

Will — Execution — Attest and subscribe.

The deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name *in that character*.

The Court held, that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid.

ISAAC GRIFFITHS, late of Five Ways, Cradley Heath, Staffordshire, deceased, died on the 18th of February, 1871. Sarah Ann Griffiths, the widow, as residuary legatee, propounded a will of the deceased bearing date the 8th of February, 1871. The defendants Edward Griffiths and John Griffiths, pleaded that such will was not executed in accordance with the provisions of the statute 1 Vict. c. 26, and they gave notice that they only intended to cross-examine the witnesses produced in support of the will. The will propounded was in form and substance as follows:—

"February the 8th, 1871.

"This is to certify that I, Isaac Griffiths, pork butcher, Five Ways, Cradley Heath, do leave all propertys and moneys *belonging to me Isaac Griffiths, to my be- [301
loved wife Sarahan Griffiths, and at her death to my daughter, Jane Griffiths.

"Sined ×

"Excetrs. James Frederick Homer.
"William Tromans.
"Witness. Stephen Farmer."

Stephen Farmer deposed, that on the 8th of February he saw the deceased, who was then ill in bed. The deceased sent him to Dudley for a will stamp. He returned from Dudley, and told the deceased that a stamp was not required, plain paper would do. The deceased told his wife to fetch some paper, which she did. The deceased then asked Mr. Homer, who was present, to write a will for him; but Mr. Homer said he had never seen or written a will, and did not understand it. The deceased asked him to write down what he, the deceased, told him. That was done. It was read over by deceased, who then called his wife to hold him up, which she did; and he made his mark. The deceased then gave the paper to Homer, and told him to sign his name, which he did, and then deponent signed his name. Deponent further said, that he saw deceased make his mark, and it was made in the presence of himself and Homer. The paper was afterwards sent to Tromans, who was not in the room; and when it was brought back deponent saw Tromans' name upon it. On cross-examination, he further said, he saw the word "executors" written. Deceased told Homer he wanted him to be one of his executors. He said so both before and after the will was signed. He wished to have two executors, Homer and Tromans. He understood Homer signed as executor by the desire of deceased. Referring to the word "witness," deponent added, he considered Homer as the other witness. He himself signed also as witness. It occurred about eight in the evening.

James Frederick Homer deposed that the body of the will and the word "excetrs." was in his handwriting; but he could not say whether he wrote the latter word before or after the deceased had made his mark. Deceased spoke to him about being executor as soon as he entered the room. Tromans was to be executor also. After deceased had put his mark, he told deponent to sign as executor, which he did. After Farmer had signed, deceased *told the deponent to take it to Tromans, [302 who was ill. Tromans signed his name, and deponent took the paper back to the deceased.

Mrs. Griffiths also deposed that her husband told Homer to write his name as executor, and then gave the paper to Farmer to write his name as a witness.

Nov. 3. *Huddleston, Q.C., Dr. Tristram*, and *Loxdale Warren*, appeared for the plaintiff. The requirements of the statute have been satisfied. The deceased made his mark in the presence of two witnesses; who thereupon signed their names in his presence. Even if Homer signed his name as executor, he may also be taken to have signed it as a witness, to have attested the signature as the testator's signature to the will.

Ballantine, Serjt., and *Inderwick*, for the defendants. On the face of the paper it is obvious that the will was not duly executed. The word "executors" in the plural stands opposite two of the names; "witness" in the singular, opposite the name of Farmer. It is clear, therefore, it was not intended there should be more than one witness. If Homer signed as executor only, under the misapprehension that it is necessary that an executor should do so, the will is invalid.

Lord Penzance. As no case has been cited on either side, I must take time to look into them, for it is advisable in these matters of execution, that the Court should follow the previous decisions. The statute requires the witnesses shall attest, and shall subscribe; if, therefore, a witness puts his name on the paper alio intuitu, it will not suffice. On the other hand, the Court ought not to be quick to conclude that, because the testator does not ask the witness in so many words to attest his signature, it is, therefore, not a good execution.

Nov. 14. Lord Penzance. I took time to consider whether, under the circumstances disclosed by the evidence, this will was duly executed. It is signed by the testator in the presence of two witnesses, and they both signed their names in his presence; but opposite the name of one of these witnesses, appears the 303] word *"executors" and opposite that of the other "witness" a third person afterwards signed his name, opposite the word "executors;" but that name was not written in the presence of testator. There is no further attestation clause. On the one side it was contended that the testator duly executed his will in the presence of two witnesses present at the same time, who subscribed in his presence; on the other side it is said the will was not duly executed; because one of the witnesses signed as executor only, and not as a witness to the

execution of the will. I am inclined to think the question revolves itself into one of fact. Did he sign as an executor only, or as a witness also? I have tried to find cases in illustration of the proposition that it is necessary that a witness to the execution of a will shall sign as witness; but I have not met with any in point. The statute says, that the witness shall *attest*, and shall subscribe the will; which must mean that he shall put his name to the will as attesting the fact that he saw the testator sign it; that is, he must put his name as witness. In a case before me: *In the goods of Sharman* (1), I said, "When a testator has signed his name in the presence of two witnesses, and at his request they attest his signature, the execution is complete; and if a third person afterwards adds his name the Court will not come to the conclusion without cogent evidence that that third person signed as an attesting witness." I then investigated the question whether the third person signed as witness, or whether the execution was completed without his signature. Making the same inquiry in this case, I come to the conclusion that Homer did sign as witness. According to the evidence of Farmer, the deceased asked his wife to hold him up in bed; the deceased then signed with a cross, and told Homer to sign, which he did. Prima facie from this evidence it would appear Homer signed as a witness. On cross-examination, Farmer said that Homer signed as executor and as witness also. It may have very well been that Homer was called upon to sign as witness as well as executor, and that he considered he signed in both characters. Homer himself gave evidence that the testator asked him to sign as executor: in cross-examination, he said the testator's words were, "he asked me to sign." The *Court is of opinion that Homer did [304 not sign exclusively as executor; but that by his signature he meant to affirm that the deceased executed the will in his presence. Probate may issue. The costs of all parties to be paid out of the deceased's estate.

Attorneys for plaintiff: *Mackeson, Taylor, & Arnould.*
Attorneys for defendants: *Emmets, Watson & Emmet.*

(1) Law Rep., 1 P. & M., 661.

Nov. 21, 1871.

In the Goods of G. H. Foster.

[Law Reports, 2 Probate and Divorce, 304.]

Will — Executor substituted.

The deceased, by his will, appointed his wife sole executrix, and in default of her, two other persons to be executors. The wife took probate, and died:—

Held, that such other persons were, on the death of the wife, entitled to administer the estate of the deceased as substituted executors.

George Holgate Foster, late of the Holme, Regent's Park, Middlesex, died on the 1st of December, 1858, having made a will bearing date the 24th of July, 1857. In this will appears the following clause:—"I do hereby authorize my executrix, or executors hereinafter named, to continue any security or securities which I may die possessed of for any term in their discretion not exceeding five years from my death, notwithstanding any of the trusts aforesaid in this my will contained; and I nominate and appoint my said wife sole executrix of this my will, and, in default of her, I nominate and appoint the said John Knowles and Richard Foster to be executors of this my will; and I nominate and appoint my said wife, the said John Knowles and Richard Foster, and the said Christopher Proctor trustees of this my will."

On the 23d of December, 1858, probate of this will was granted to the widow, Maria Isabella Foster, who died on the 25th of May, 1871, leaving part of the deceased's estate unadministered. She made a will in which she named several executors, who took probate thereof on the 5th of July, 1871.

The draft of the deceased's will prepared by his attorney, did not contain the appointment of John Knowles and Richard Foster to be executors, that was added by the deceased in copy-
305] ing out the *will. John Knowles and Richard Foster were nephews of the deceased, and for many years before his death had been connected with him in business, and on his retirement carried on the business.

Dr. Swaybey applied to the Court to decree probate to John Knowles and Richard Foster as the substituted executors named

by the deceased in default of his wife. A default has arisen by the death of the wife. The executors of the wife consent to the motion. He referred to *In the goods of Henrietta Johnson*, deceased. (1)

Lord Penzance. This is a question of construction as to what the testator meant when he said, "I appoint my wife sole executrix, and, *in default* of her, I appoint John Knowles and Richard Foster to be executors." John Knowles and Richard Foster were persons whom it was reasonable the testator should appoint as executors; but he chose to give a preference to his wife, as I understand the will, so long as she was able to act. The question is, whether the substitution was to take place only in the event of her not acting at all, or whether, as has happened, in the case of her death, after having taken probate. The Court will not construe the words of a will in a technical spirit, but will endeavor rather to carry out the real object of the testator. I think it is reasonable to hold that the testator intended that his wife should administer so long as she could; and that, in the event of her death either before or after taking probate, he substituted other persons. I am prepared to make the grant.

Attorneys: *Tatham & Procter.*

June 6, 1871.

*Newsome v. Newsome. [306

Law Reports, 2 Probate and Divorce, 306.

Dissolution — Effect of Agreement not to take Proceedings for Divorce — Adultery subsequent to Agreement — Condonation.

A wife knowing that her husband had been guilty of incestuous adultery with her sister, signed an agreement that she would forgive him, and would not take proceedings against him on account of such incestuous adultery, in consideration of his retirement from a then subsisting partnership in business with her father and brother. It was further agreed that they should not live together, but that they should see each other from time to time. The agreement also contained this clause: "The agreement or contract binds me (the wife) only so long as you remain true to me in love and duty." After the date of the agreement the husband

(1) 1 Sw. & Tr., 17; 27 L. J. (P. M. & A.), 9.

was guilty of adultery, but not of incestuous adultery. The Court held that this subsequent adultery restored to the wife her right to have the marriage dissolved on the ground of the previous incestuous adultery.

Condoned incestuous adultery is revived by subsequent adultery not incestuous.

THIS was a petition by Elizabeth Newsome for a dissolution of her marriage with Peter Newsome, on the ground of his incestuous adultery with her sister. The petition alleged that the incestuous adultery was committed in February and March, 1868; that in July, 1868, the petitioner became aware of it, and separated from the respondent; and in 1869, since the separation, the respondent had on divers occasions committed adultery with other women. The respondent by his answer denied the adultery charged, and pleaded condonation.

The case came on for hearing before the Judge ordinary without a jury on the 5th of April, 1871.

It was proved that the parties were married in February, 1862, and afterwards cohabited at Huddersfield, where the respondent, in partnership with the father and brother of the petitioner, carried on the business of provision merchants. In February and March, 1868, the respondent was guilty of incestuous adultery with the petitioner's sister. This came to her knowledge in July, 1868, and they separated. The respondent went to America for a short time, and a correspondence, apparently in affectionate terms, was kept up between him and the petitioner. After a short absence he returned to Huddersfield, and negotiations were then entered into between him and the 307] petitioner with regard to a dissolution *of partnership, which was very much desired by her father and the rest of her family. The respondent did not wish to retire from the partnership, but ultimately consented to do so in consideration of the sum of 1000*l.*, and of an agreement which was drawn up by him, and signed by him, and by the petitioner, and one of her brothers, on the same day, the 25th of November, 1868, as the agreement for the dissolution of partnership. The agreement was for a time kept secret from every one but the three persons who signed it. It was contained in two sides of a folded sheet of foolscap paper, and was in the following terms :—

I, Elizabeth Newsome, promise you, Peter Newsome, in presence of John Ward, forgiveness for all your past offences and irregularities whatsoever, and for which act of forgiveness you give up to me your interest and place in the business conducted at No. 9, Kirkgate, Leeds, or elsewhere, under the style or

firm of Ward & Co. My brother John here present knowing I cannot hold a legal place in the firm in consequence of my being a married woman, solemnly promises you on honor that for five years ending December 31st, 1873, 25 per cent. of the profits shall accrue to me just as heretofore they accrued to you, as specified in the deed of partnership at present existing between Richard Ward, John Ward, and yourself. It is to be understood my father, Richard Ward, only agrees to me receiving the 25 per cent. above named for two years, and 15 per cent. afterwards, so long as I remain in the business; but my brother, John Ward, having regard to my past services, at your request, solemnly promises to secure to me the full interest above named if it lay in his power. I also, on my part, solemnly promise not to sue for a divorce from you, or legal separation of any kind, so long as you do not interfere with me or my property according to my moral right by virtue of this contract. For all the above-named advantages, and every other advantage not here named but understood amongst us, the said Richard Ward, Elizabeth Newsome, John Ward, and Peter Newsome, you relinquish your present position as a member of the firm of Ward & Co., as above named, for ever, and sign a deed legally dissolving such partnership as the forms of legal procedure dictate. I and my brother, John Ward, appreciate the sacrifice you make in relinquishing your hold upon a business you have done so much to establish, and would not ask this sacrifice had not you committed yourself so far as to make no other peaceable arrangement feasible. It is agreed that no announcement of the dissolution of partnership be made in the local newspapers, saving such as they may voluntarily copy from the official *London Gazette* in the ordinary manner.

Agreed to.
Signed and sworn to.

{Elizabeth Newsome.
Jno. Ward.
Peter Newsome.

See over.

This was the end of the first side of the paper. The second side was as follows:—

Note.—The agreement, or contract, on page No. 1 of this sheet binds me only so long as you remain true to me in love and duty, and leave me sole mistress of *my own affairs and actions in all respects as if I was still unmarried [308 to you (saving, of course, that I do not marry again), all moneys belonging to me now in my own right, or coming to me in future from whatever source, shall be at my own absolute disposal; our child, Kate Helen, shall be under my control, and should you interfere against my wish with myself, my child, my money, or anything belonging to me, according to the spirit and wording of this arrangement, I am absolved from all herein solemnly sworn to. I, at your request, agree not to consult John Thackrah, solicitor, nor any other solicitor, neither will I entertain any advice or counsel respecting a divorce or other legal separation from you, but reject all approach of such advice or counsel as detrimental to the intention of this contract from whomsoever offered. It is agreed that all reproaches for past errors and mistakes be buried, and we covenant between us to refuse on any account to debate them. It is agreed that you do not permanently reside in Leeds or suburbs, nor enter into any business there against my wish, but that you go to work in some distant place, and exert your utmost endeavour to better your circumstances in life, and by a course of correct and consistent conduct and honorable regard to your position as my husband retrieve the position you have lost. The letters you wrote under distressed or violent feelings I solemnly swear

never to use against you in any emergency. I promise I will employ my time for the future so far as I am inclined or able similarly to your desire in 1865, 1866, 1867 and 1868, viz., devote it to the business at No. 9, Kirkgate. As agreed upon then, so now will I continue to refrain from household work during the six days, and on Sundays take complete rest, just as if I belonged to the male sex, barring, of course, occasions of necessity. I do agree to permit you to visit me, say not more than once a week, reserving to myself the power to make the visit private or otherwise, and to limit it to thirty minutes if I am so disposed. I give you the hope of regaining me as an incentive to good and useful effort, but should I not be satisfied with your future conduct, this hope gives you no claim.

Signed and sworn to. { Elizabeth Newsome. Jno. Ward. Peter Newsome.

The petitioner and respondent met secretly from time to time in pursuance of the agreement, and a good deal of contradictory evidence was produced as to what occurred at these meetings, the respondent asserting and the petitioner denying that conjugal intercourse had taken place between them. The last meeting was on the 19th of April, 1869, and after that date the petitioner refused to see the respondent again, and on the 30th of May, 1870, this petition was presented. It was proved, and not denied, that in June, 1869, the respondent had been guilty of adultery with a woman at Huddersfield.

Hawkins, *Q.C.*, and *Searle*, for the petitioner. There was no condonation, for even if there were conjugal intercourse (and it is submitted that the evidence disproves it), that does not 309] necessarily *amount to condonation: *Keats* v. *Keats and Montezuma* (1). But, even assuming condonation, the offence condoned was revived by the subsequent adultery, although that subsequent adultery was not incestuous: *Dent* v. *Dent.* (2)

Inderwick, for the respondent. The conduct of the petitioner amounted to condonation, for she was bound by the agreement, and had no right to break it in April, 1869, by refusing to meet the respondent, as she had met him up to that time. The subsequent adultery, not being incestuous, did not revive the petitioner's right to complain of the incestuous adultery which she had condoned.

May 9. THE JUDGE ORDINARY. The question in this case

(1) 1 Sw. & Tr. 334; 28 L. J. (P.M. & A.), 57.

(2) 4 Sw. & Tr., 105; 34 L. J. (P.M. & A.), 48.

was argued by counsel as one of condonation, but in the view I am disposed to take, the question is not whether the petitioner condoned, but whether, after by a written agreement she has bargained away her right to come to this court, this Court will permit her to throw aside that agreement and avail herself of the remedy to which she would, but for this agreement, be entitled. His lordship referred to *Rowley* v. *Rowley* (1); *Hooper* v. *Hooper* (2); *Buckmaster* v. *Buckmaster*. (3)

April 30. *Searle* (*Hawkins*, *Q.C.*, with him), for the petitioner. The Court will, no doubt, enforce a bargain that a wife will not, in consideration of some advantage given by her husband, take proceedings in this court for a matrimonial offence which, without such bargain, would entitle her to relief. But the Court must look at the circumstances of each case, and especially the terms of the bargain. The petitioner in this case signed her name to the agreement, which was drawn up by the respondent himself—and is in his writing—in order to spare her father the annoyance of continuing in partnership with the respondent, and the agreement should not be considered strictly against her. The two agreements must be read as one document; they were signed at the same time, and were evidently intended to form one agreement. The second part of the agreement contains an express stipulation that the first part *shall not be binding on the petitioner if the respondent does [310 not remain true to her. It is not, as in *Rowley* v. *Rowley* (1), an absolute release. The subsequent adultery of the respondent was a clear breach of the condition, and entitled the petitioner to institute this suit as if no agreement had been entered into.

Inderwick. The petitioner having obtained the advantage for which she bargained, namely, the dissolution of partnership, was bound by the agreement. But it was the petitioner, and not the respondent, who broke the agreement, for she refused in April, 1869, to continue the meetings for which he had stipulated. Up to that time he had performed all his obligations; and the agreement having been first broken by her, she

(1) Law Rep. 1 H. L., Sc., 63.
(2) 1 Sw. & Tr., 602; 3 Sw. & Tr., 251; 30 L. J. (P. M. & A.), 49.
(3) Law Rep. 1 P. & M., 713.

is not entitled to rely upon his subsequent breach of it as restoring to her the right of instituting this suit.

Cur. adv. vult.

June 6. THE JUDGE ORDINARY. This is a case with regard to which I entertained some serious doubts. The incestuous adultery of the respondent was proved, and not denied. The contest between the parties turned on the issue of condonation, and considerable evidence was produced on the question whether what had taken place after the separation did or did not amount to condonation. The petitioner discovered the respondent's incestuous adultery some time in the summer or autumn of 1868. The respondent was at that time in partnership with her father, and she and her family were very anxious that he should be made to leave that partnership. The respondent left England for a time and went to America, and on his return negotiations were entered into, and the result was a written agreement, signed both by the petitioner and the respondent. By the terms of that agreement she was to forgive her husband for what had occurred, and to take no proceedings against him in the Divorce Court, but a condition was attached to this promise that he should remain faithful and true to her. There was also a provision that, although they were not to live together, she was to allow him to see her at certain stated times. During the latter part of 1868 and the beginning of 1869 the respondent did see the petitioner under this clause of the agreement on many occasions. These visits always occurred at *some place 311] where the petitioner was not known, and the respondent was, under the agreement, keeping away from the town where she and her family resided. The visits were continued during some months. A correspondence was put in which showed very plainly that the respondent was constantly desiring to see more of the petitioner, and that she was desiring to see less of him. In April, 1869, the arrangement came to an end in consequence of the petitioner refusing to continue to meet the respondent. Some angry letters passed, and eventually this suit was instituted.

It seemed to me that, under these circumstances, the question of condonation did not arise at all. Condonation in its ordinary acceptation is a forgiveness by the wife implied from her restoring her husband to the original position which he occu-

pied before the condoned offence was committed. When the husband is restored to his original position the law implies forgiveness, but forgiveness of a peculiar character, because it is coupled with the condition that the husband shall not in future be guilty of any marital offence. The whole doctrine of condonation — a very useful doctrine no doubt — is a structure of the Courts founded on the necessities of the case. But the question does not arise here, for the parties have entered into a written agreement, and whatever ground there may be for saying that the wife forgave the husband must be found in the agreement itself, which supersedes any presumption of law, and the conduct of both parties must be referred to that agreement.

But passing by that consideration for the moment, and dealing with the case as one of ordinary condonation, the question arises whether the conduct of the wife was such that the Court is bound to draw from it the conclusion of condonation. It seemed to be supposed that everything depended on the question whether there had been sexual intercourse between the parties. The bulk of the evidence on that question was quite contradictory; but if I were bound to come to a conclusion upon it, I should be of opinion that there was conjugal intercourse between them on the occasions when they met. That fact, without explanation, might perhaps — although I do not say it would — amount to condonation. Assuming, however, that there was condonation, the answer of the petitioner is complete. She says: "It is immaterial whether I did or *did [312 not condone the incestuous adultery committed in 1868, because my husband was guilty of adultery in 1869;" and the adultery in 1869 was proved, and not denied. In answer to this it was argued that incestuous adultery which had been condoned could not be revived by ordinary adultery. That depends on the condition which the Court implies in cases of condonation. When a wife condones a husband's incestuous adultery, what is the condition upon which the condonation is to protect him against a suit? The condition must be the same as in all other cases of condonation, namely, that the husband shall not be guilty of adultery or of any other marital offence. When incestuous adultery is condoned, I think the condition is not merely that the husband shall not again commit incestuous adultery, but that he shall be true to his marriage vows.

Having dealt with the supposed condonation, I recur to what I have already indicated to be the true question in the case, namely, the rights of the parties under the written agreement.

The substance of the agreement, in the first sheet, is, that the petitioner will forgive the respondent and forbear to sue for a divorce, on the condition that he will retire from the partnership. This he did, either on the same or the very next day. He said he would rather give up his partnership than his wife, and he signed a deed of dissolution of partnership, receiving 1000*l.*, which probably did not represent the value of his interest in the business. He paid a price — and no doubt a considerable price — to obtain the agreement that she would not sue him in this court; and if the agreement had stopped there, it is quite clear that, independently of any question of condonation, the petitioner could not have been entitled to found a suit upon the incestuous adultery, for she had bargained away her right to do so, and the bargain was one which the Court would uphold. But the second sheet of the agreement, which was signed at the same time, begins thus :— "Note.— The agreement or contract on page 1, of this sheet binds me only so long as you remain true to me in love and duty," &c.; and it ends: "I give you the hope of regaining me, as an incentive to good and useful effort; but should I not be satisfied with your future conduct, this hope gives you no claim." The first sentence in this second page seems to me to be the most important part of the
313] *agreement. It provides that the agreement contained in the first page shall only be binding on the wife as long as the husband remains true to her. Without saying what other condition these words may include, I think it would be impossible for the Court to hold that they do not include a condition that he shall not be guilty of adultery. I cannot say that the respondent, having been guilty of adultery, did remain "true to the petitioner in love and duty." I hold therefore that the husband, by his adultery in the summer of 1869, set the wife free from the agreement which she entered into in 1868, and, consequently, that she is entitled to a divorce on the ground of the incestuous adultery committed in 1868.

I am bound to add, that my mind has not been free from doubt on the case. The husband gave up a lucrative position on the hope held out by the wife that she would pardon him,

and I cannot find that he did anything up to the time when she refused to continue to see him to forfeit his claim under the agreement, or to justify her in refusing to carry out the arrangement contained in the agreement. On the 19th of April matters were brought to a crisis; but up to that time the respondent had done nothing to justify her in the course she then took. But afterwards he committed adultery; and I feel bound to hold that his adultery deprived him of what would otherwise have been a good defence to the suit.

Decree nisi, with costs.

Attorneys for petitioner: *Blakeley & Beswick.*
Attorney for respondent: *J. B. Wheeler.*

Improper conduct which would not justify separation, revives the former offense; *Burr* v. *Burr*, 10 Paige, 20; affirmed Ct. Errors, 7 Hill, 207; *Whispell* v. *Whispell*, 4 Barb., 217; 2 Bish. Mar. and Div. (4th ed.), §§ 53–66.

And even cruelty will revive adultery, so as to entitle the plaintiff to a divorce on account thereof; 2 Bish. Mar. and Div. (4th ed.), §§ 57, 58, explaining the earlier cases in New York; *Hofmire* v. *Hofmire*, 8 Edw. Ch., 173, 7 Paige, 60; *Johnson* v. *Johnson*, 14 Wend., 637, reversing, 4 Paige, 460; *Gardner* v. *Gardner*, 2 Gray, 434, 442.

And although cruel treatment be not sufficient to justify a divorce on account of prior adultery, it may be given in evidence in support of the charge for the new offense; *Johnson* v. *Johnson*, 4 Paige, 460, 14 Wend., 637.

There never was the slightest question if the offense was of a similar character; 2 Bish. Mar. and Div. (4th ed.), § 58.

The court will connect the whole of his conduct in order to form a correct judgment; 2 Bish. Mar. and Div. (4th ed.), § 59.

Nov. 21, 1871.

*Charter v. Charter. [315

Law Reports, 2 Probate and Divorce, 315.

Will — Appointment of Executor — Latent Ambiguity — Parol Evidence.

The testator appointed as his executor his son Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter.

The Court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration

of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him.

It would seem that in such a case the Court may receive parol evidence of the intention of the testator.

FORSTER CHARTER, of Woodburn Hill, Northumberland, farmer, died on the 8th of August, 1869, having duly executed 316] a will, *bearing date the 23d of June, 1859. The will was in the following terms :

"I hereby nominate and appoint my son Forster Charter as the executor of this my last will and testament, and to him I give, devise, and bequeath all my messuages, &c., for his own use and benefit, and for the use and benefit of the persons hereinafter to be named. My will is, that my executor, Forster Charter, shall annually pay to Elizabeth, my wife, the sum of 10*l.* sterling, and at the same time allow my said wife her ordinary maintenance, so long as they reside together in the same house; but should they think proper to live separately, then my will is that, besides paying my wife the above-named annuity of 10*l.*, the said Forster Charter shall allow my said wife, rent-free, the use of the cottage at Woodburn Hill now occupied by Daniel Wood, and shall also supply her, gratis, with a reasonable quantity of bread, corn, potatoes, coals, butter, cheese, and garden produce. Also my will is, that should any difference of opinion arise between my said executor and my said wife with regard to the quantity or quality of the above bread, &c., the matter shall be laid before Walter Davison, shoemaker, and his decision shall be final. Moreover, my will is, that if my daughter Barbara Forster should at any time be sick or in want, my said executor shall afford her such pecuniary and other aid as she may require, and his own circumstances may permit, the kind and amount of aid to be determined upon by the above-named Walter Davison."

Probate of this will was granted on the 16th of September, 1869, to William Forster Charter, the elder son of the deceased, but such probate was called in by a citation dated the 24th of August, 1870, at the instance of a younger son of the deceased, Charles Charter, who claimed to be the person appointed executor in the will of the deceased. The deceased had had a son called Forster Charter, who died in infancy many years before the date of the will. At that time, and also at the time of his

death, he had two sons living, William Forster and Charles, and an unmarried daughter, Barbara (in the will misnamed Barbara Forster). William Forster Charter was the elder son, and up to the year 1850 usually resided with his father. In that year he set up for himself as a butcher at Cleator Moor, Cumberland, about 100 *miles from Woodburn Hill, and [317 in 1853 he emigrated to Australia, from whence he returned in 1856, when he again established himself at Cleator Moor, and has continued to reside there from that time. He was never addressed or known by his father or family by the name of "Forster," but always as William. Charles Charter, the younger son, with the exception of a short period in 1859 and 1860, about the time the will was executed, lived with his father and mother at Woodburn Hill from his boyhood until his father's death, and worked for and assisted his father (without wages) in managing the farm. Affidavits were filed from members of the family and independent witnesses, setting out declarations of the testator made at the time of and subsequent to the date of the will, and almost to the day of his death, that Charles Charter was his heir, and that he had not left, and would not leave, anything to his elder son. The reading of these declarations was objected to on behalf of the defendant.

Dr. Tristram, and *Pritchard*, appeared for the plaintiff Charles Charter. [They referred to Wigram's Extrinsic Evidence, prop. 5; *Camoys* v. *Blundell* (1); *Douglas* v. *Fellows*.(2).]

Dr. Spinks, *Q.C.*, and *Bayford*, for the defendant William Forster Charter. [They cited Jarman on Wills, 3d ed., p. 401; *Doe* d. *Gord* v. *Needs* (3); *Doe* d. *Morgan* v. *Morgan* (4); *Jones* v. *Newman* (5); Williams on Executors, 6th ed., p. 1072; *Doe* v. d. *Hiscocks* v. *Hiscocks* (6).]

Cur. adv. vult.

May 13th. Lord Penzance. The question raised in this case is somewhat peculiar. The deceased appointed as his executor his son, Forster Charter. It turns out that he had no son of that name; his eldest son was named William Forster Charter, his second son Charles Charter. It is beyond dispute, that

(1) 1 H. L. C., 778.
(2) Kay, 114; 23 L. J. (Ch.), 167.
(3) 2 M. & W., 129.
(4) 1 C. & M., 235.
(5) 1 W. Bl., 60.
(6) 5 M. & W., 363.

evidence as to the circumstances under which the testator wrote his will, as to the different names and circumstances of the people about him, and other surrounding matters, is admissible in such a case. That is a principle laid down by Lord Abinger in *Doe* d. 318] *Hiscocks* v. **Hiscocks* (1), so that I am at liberty to put myself in the position of the testator in order, from the surrounding circumstances, to judge under what state of things he wrote his will. Reading the evidence to this extent, it turns out that the eldest son, William Forster Charter, had ceased to live at home for many years, and that the younger did reside there until his father's death, and the will, in its provisions, clearly points to the fact that the executor at the time was living in the house with his mother. Moreover, the writer of the will has obviously confused himself with the name of Forster, for the daughter whose name, of course, was Barbara Charter, is called Barbara Forster. It was argued that in difficulties of this character the Court cannot look to evidence, especially parol evidence, of the intention of the testator or to declarations of his intention to leave the property to a certain person. I postpone the consideration of this question, for I think it is possible to come to a conclusion without such evidence. The testator appoints as executor his son Forster Charter, when there was no such person. It is argued, however, there was such a person, namely, William Forster Charter; but in law, if a man has several Christian names, they are all but one name; they constitute but one Christian name. And again, by what name does a man go? When the Court construes a will according to the intention of the testator, it must bear in mind, not only what name an individual had, but by what he usually went. The testator never spoke of his elder son by the name of Forster, but always as William. If the name had been Forster William instead of William Forster, there would be some reasonable ground for the argument that he is the person meant; or if the testator had named as executor his son William, the omission of the name Forster would not have been material, but it is impossible to conceive that he intended to describe his elder son by the name Forster Charter. If he had desired to make him a bequest, he would have done so in his usual name of William, and not in that of Forster. It is plain to the Court that what

(1) 5 M. & W., 363.

has been written is a mistake — a blunder arising out of the testator's own name. It is said, however, that as the deceased has made use of one of the names of the elder son, it must be assumed that he *meant his elder son; but the descrip- [319 tion does not apply to the elder son either accurately or colloquially, as the father used to describe him. It is clearly a slip of the pen, and because the mistake takes the form of part of the Christian name of an individual, that circumstance will not settle the dispute in favor of that person. According to the rule laid down by Lord Abinger in *Doe* d. *Hiscocks* v. *Hiscocks* (1), it appears to me that the Court is able to admit parol evidence in this case. He said, "There is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise on the face of it is perfect and intelligible; but from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words of the will), the testator intended to express." In this case the ambiguity arises from the double description, "my son, Forster Charter." To part of this description each of two persons answers; to the other, *Forster Charter*, neither.. Lord Abinger went on to say, referring to certain cases, "they do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivocal description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either a mere blank, or applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation, and in that case evidence of the intention of the testator seems to be receivable." Turning to the other cases, the one most like the present was *Careless* v. *Careless* (2), where the bequest was to "Robert Careless, my nephew, the son of Joseph Careless." It appeared that the testator had no brother named Joseph, but two named John and Thomas, each of whom had a son named Robert. The Court admitted evidence to explain the ambiguity, and putting together what was decided in that

(1) 5 M. & W., 363. (2) 1 Mer., 384.

case, in *Price* v. *Page* (1), and in *Still* v. *Hoste* (2), by the Courts of Equity, I think I should be warranted in resorting to general
320] evidence in the case before me, if I were *so minded; but, in my opinion, it is not necessary. I have already stated the circumstances of the case, and that there has plainly been a mistake. The testator was not on good terms with his elder son, who resided some distance from him. A provision is made in the will that the executor shall pay annually to testator's wife the sum of 10*l.*, and allow her her ordinary maintenance, so long as she and the executor reside together in the same house. This provision points to an existing residence, although it might be made to fit in with the other son, if he gave up his business. It is more probable, however, that the testator projected that the widow would continue to live with her younger son. If he had intended that she should go and live with the elder son, or that the elder son should give up his business, he would have used different terms from what he has done. For these reasons I have come to the determination that the use of the words Forster Charter was obviously a mistake. The writer of the will has had at the time in his mind the name of the testator, and has made a bungling performance of his work. The probate must be revoked, and granted to Charles Charter, but the costs of both parties will be paid out of the estate. I may say that if I had had occasion to refer to the parol evidence generally, it would have confirmed the view I have now taken.

Subsequently, on the application of *Dr. Spinks, Q.C.*, and on the grounds that on the previous occasion he had only argued the question of law as to the admission of parol evidence, and by arrangement with the other side, had not entered into the merits of the case as the defendant desired before doing so to cross-examine the witnesses who had made affidavits in support of the plaintiff, the Court ordered the cause to be reheard. The rehearing took place on the 8th and 10th of November, 1871.

Manisty, Q.C. (*Dr. Spinks, Q.C.* (and *Bayford* with him), appeared for the defendant, William Forster Charter. The deceased executed his will in 1859, and he died in 1869. The will was read over to the family at the funeral, and it was taken for granted by all that the property was given to the defendant, and

(1) 4 Ves., 680. (2) 6 Madd., 192.

this view of the matter continued for twelve months, until the litigation commenced in June, 1870. Where an ambiguity arises on a will it may be explained by extrinsic circumstances; but it will not arise *if an unbiassed person on reading [321 the will and knowing the state of the family could have no doubt as to the person intended.

[LORD PENZANCE. Your argument goes to this extent, that if a man has four or five Christian names, and one of them only is given in the will, that is a proper description.]

Manisty. No. There must be a sufficient description to identify him. In this case we say the will contains an adequate description of William Forster Charter. The deceased had two sons only, and as Charles was never called Forster, there can be no ambiguity.

[LORD PENZANCE. It may not be a false description where one of several names only is used, and that one by which the person was never known or called, but it is an inadequate one. A part of a name may produce as much uncertainty as if a wrong name were given. Surely in such a case evidence must be gone into to show whether or not a blunder has been committed.]

Manisty. The material fact in this case is that the part of the name given is enough to identify the elder son, seeing that that part in no way belongs to the younger, not having been given to him in baptism or otherwise. Our proposition is that the will may be read as referring to the defendant, although his name imperfectly answers that in the will; seeing there is no other person to whom the description more precisely answers. There is no ambiguity in an imperfect description, that arises where it can be shown that the description applies to two persons indifferently or equally; and it must arise on the will, and not in the mind of some person. If the description be so imperfect that the Court cannot say to whom it belongs, it will not decide in favor of either of the parties; there will be no will. Assuming the Court holds that there is an ambiguity, and that all the facts given in evidence may be legitimately admitted, we further contend that they do not show the testator intended to prefer the younger to the elder son. In his two previous wills, testator had not excluded the elder son, who although much absent was always on good terms with his father, whereas at the time the will was executed the plaintiff was

estranged from his father, and had for a time left his home, to which he was allowed to return through the mediation of his brother. They referred to 1 Jarman on Wills (3d ed.) 407–322] 409; *Doe* d. *Hiscocks* v. *Hiscocks* (1); **Doe* d. *Allen* v. *Allen* (2); *King's College Hospital* v. *Wheildon* (3); *Miller* v. *Travers* (4); Wigram's Extrinsic Evidence, prop. 7.

Dr. Tristram and *Pritchard*, who appeared for the plaintiff, were not required to argue the case.

Nov. 21. LORD PENZANCE. A misapprehension occurred in this case which led to its being reheard, after an opportunity had been given for cross-examining the witnesses who had made affidavits. In the result the case remains much the same as before. If the evidence is admissible it is difficult to come to any other conclusion than that the testator intended to make his younger son Charles his executor and legatee. The two attesting witnesses speak to unequivocal declarations by the testator to that effect at the time the will was made. The widow deposes that this was the testator's constantly expressed intention all along, and that he said he had done it over and over again after the will was made and up to the time of his death. John Thompson and William Walton, neighboring farmers, and many others, speak to the testator's reiterated statements that he had left all to his son Charles, who resided with him. James Rutherford and Robert Ward, intimate acquaintances of the testator, speak to the same effect, and the latter, who was present when the will was read after the funeral, at once called out it was a mistake. Then there is the provision in the will that the executor should allow the widow her ordinary maintenance "*so long as they reside together.*" The fact being that the younger son, Charles, was then and up to the testator's death residing with his mother, whilst the elder brother was resident at a place a hundred miles off, and engaged in business there. And, lastly, there is the fact distinctly sworn to, and not contradicted, that the defendant was never called or known by the name of Forster, but only William or Willie. Against these facts the defendant has little to set in the way of evidence. The principal, if not the only statement of import-

(1) 5 M. & W., 363.
(2) 12 Ad. & E., 451.
(3) 18 Beav., 33.
(4) 8 Bing., 244.

ance being, that about the time the will was made the younger son Charles had a quarrel with his father and left home for a time. *This is indeed deposed to by the defendant and [323 one of his sisters; but it is positively contradicted by the plaintiff and his mother, who both swear that the disagreement was with his mother and not his father. The time of his leaving home is also in dispute. The defendant's version of this affair can hardly be true if the attesting witnesses have given a truthful account of the testator's declaration. If the evidence then is admissible of the testator's intentions, I come without difficulty to the conclusion that the plaintiff was the son intended; but was the evidence admissible? I am not sorry that the case has been reargued, for it has brought out more prominently than ever the real basis of the defendant's contention, and has, I venture to think, narrowed that contention to a very distinct and definite point, which is this: that as Forster is one of two names by which the defendant was christened, there is no ambiguity in the will to be removed. The defendant in short says this, "Forster is at least one of my names, and it in no way belongs to my brother, so that the description, if not quite accurate, is at least more like my name than his. Therefore there is no ambiguity as to which of us was meant." But is this proposition correct? If a man be christened by several names they constitute in law but one Christian name, and any one of them, the rest being omitted, is not the full legal name of the individual. I am far from saying that a bequest to a man by his first Christian name, or by any one of them, by which he is familiarly known or even commonly called by the testator, would not be a valid bequest. Undoubtedly it would. But this is a case in which the name used is neither the legal Christian name, nor the first name, nor a name by which the man was ever called or known by anybody. The executor is described as "my son Forster Charter." The first part of this description lies in the words "my son." The facts proved show that the testator had two sons, and two only. That narrows the indication then to two persons. The question is, does the name Forster Charter *properly or with reasonable certainty* describe either of them? If not, there is an ambiguity between the two sons, for the executor is to be a "son," and his name is not with reasonable certainty given. It is difficult, if not impossible,

to imagine that the testator, whose intention we are seeking, purposely described the defendant (whom he had never called 324] by any *other name than William or Willie) as simply "Forster." There has, then, been a mistake. And this is, to my mind, a not unimportant matter, for it makes the case even stronger for the admission of evidence than others in which the Court has had to deal with a merely defective description, that is, a description in which the testator wrote what he meant to write, and all that he meant to write, but failed in accurately describing the object he had on his mind. The testator has not failed in his description from want of knowledge or memory. The error was, therefore, what Sir W. Grant, in the case of *Careless* v. *Careless* (1), called a slip of the pen. It may be that the writer of the will in this case carelessly omitted the first name, William, though the testator mentioned the full name to him. That would be one way of accounting for the mistake. Another way, and as probable an one, as it seems to me, would be to surmise that the writer had got the name of the testator "Forster Charter" in his head, and, having written it three lines higher up, had inadvertently repeated it in describing the executor. But is the Court at liberty to decide this case upon these speculations? And if there has been a mistake, whether of omission or otherwise, in consequence of which neither of the two sons is distinctly or accurately described, is not an ambiguity created; and is any other course open to the Court, if the rest of the will and the surrounding circumstances do not solve the difficulty, than to admit parol evidence of the testator's intention?

At this stage of the inquiry, it was that the plaintiff's counsel asserted the proposition to which I have before alluded, and which, if it were supported by authority, would, I think, carry him through, namely, that if the description was imperfect the Court was bound to apply it to that one of the sons whose name it most nearly resembled. Is this contention reasonable, and is it supported by authority? Once concede that there has been a mistake, and it seems to be unreasonable to exclude evidence which may be so cogent as to set all doubt at rest, and proceed to apply the blundering description to one son rather than the other, because the blunder has taken a form which more nearly

(1) 1 Mer., 384.

corresponds with the true name of that one than with the name of the other. But whatever the reason of the matter may be the court must, I think, *be bound by the authorities; [325 and how do they stand? I do not propose to go through any number of them. They are collected in Mr. Jarman's book, vol. i, p. 405. I find no case in which the proposition contended for is laid down or applied. On the other hand, I find the general principle laid down in a contrary direction by a most careful and able judge, the Lord Chief Justice Tindal. In *Miller* v. *Travers* (1) he says, "The other class of cases is that in which the description of the person who is intended to take is true in part, but not true in every particular. As where an estate devised to a person whose Christian or surname is mistaken, or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible to show who was intended to take, provided there is sufficient indication of intention on the face of the will to justify the application of the evidence." To this general statement of the rule, I will add one or two cases. In *Still* v. *Hoste* (2) the bequest was to Sophia Still, daughter of Peter Still. Peter had two daughters, Selina and Mary Ann. There was obviously a mistake. It was equally obvious that the name Selina more nearly resembled Sophia than Mary Ann did. Indeed it was hardly possible to conceive that if the testator knew anything of the real names of Peter Still's daughters, he could have blundered into calling Mary Ann, Sophia; while it was easy to conceive that he might have written Sophia for Selina. But the Court admitted parol evidence, including that of the attorney who made the will. In *Thomas* v. *Thomas* (3) the devise was "to my granddaughter Mary Thomas, of Llechlloyd, in Merthyr parish." There was no person who answered the description entirely. There was a great-granddaughter of the name of Mary Thomas, but she did not live at the place named. There was also a granddaughter who did live at the place named, but her name was Elinor Evans. Evidence was admitted to prove that Elinor Evans was the person intended. It failed to satisfy the jury, but the Court held that the evidence had been properly admitted. In this case it was strongly contended that the name of the devisee being correctly given, although the entire description was not accurate,

(1) 8 Bing., 248. (2) 6 Madd., 192. (3) 6 T. R., 671.

the Court was precluded from all inquiry by evidence, as
326] *to whether another person, whose name in no way resembled that given in the will, was the person intended; but the Court held otherwise. *Doe* d. *Morgan* v. *Morgan* (1) and *Doe* d. *Allen* v. *Allen* (2) are both cases in which there were two people each answering the description, but other provisions in the will pointed strongly to one of them in preference to the other, as the object probably intended. In neither case did the Court decide on this probability, but resorted to parol evidence.

There is, therefore, I conceive, good warrant for admitting the whole of the parol evidence, including the testator's declarations; but if these were excluded there would, I think, be sufficient to guide the Court to the conclusion that the name Forster Charles was a mistake, and that the younger son was intended. On the whole the Court pronounces in his favor, and orders the probate granted to the defendant to be revoked.

Attorneys for plaintiff: *Flux & Leadbitter.*
Attorneys for defendant; *Helder & Kirkbank.*

For cases where legatees have been erroneously named or described, see In Re Ingles, Trust L. R., 11 Eq., 578; 1 Roper on Legacies, 30–190, 2d Am. Ed., Drake v. Drake, 8 House of Lords Cas., 172; Matter of Trusts of Rickit, 11 Hare, 299. See also 3 Albany Law Journal, 263, Kurtz v. Hibner, 10 Am. Law Reg., N. S., 93, and note page 97, et seq.

January 23, 1872.

339] *TWISLETON v. TWISLETON and KELLY.

Law Reports, 2 Probate and Divorce, 339.

Husband's Petition for Dissolution — Withdrawal — Alimony.

The husband petitioned the Court for a dissolution of his marriage, by reason of his wife's adultery. In her answer the wife denied such adultery and made counter charges against the petitioner, of adultery and cruelty, which he denied, and directions were given as to the mode of trial of the facts in issue. The petitioner then moved for leave to withdraw the petition on payment of the wife's costs. A few days before the motion was made, the respondent filed a petition for alimony:—

Held, that, if a wife use due diligence in claiming alimony, the husband will not be allowed to withdraw his petition until he has paid the alimony allotted to

(1) 1 C. & M., 235. (2) 12 Ad. & E., 451.

her up to the time of the withdrawal; but that if the wife delay to present her petition up to the last moment, so that the husband has not had time to answer it, the Court will not refuse to allow him to withdraw, until he has filed an answer to such petition, and paid what the Court may allot upon it.

JAMES TWISLETON petitioned the Court to dissolve his marriage with Ann Amy Twisleton, by reason of her adultery with Thomas Kelly. The petition was filed on the 3d of March, 1871. On the 28th of April, 1871, the respondent filed her answer, in which she denied the adultery alleged against her, and made *counter charges of adultery and cruelty against the peti- [340 tioner. In Trinity Term, 1871, directions were given as to the trial of the facts in issue. On the 6th of December, 1871, the respondent filed a petition for alimony; and on the 14th of December a notice was served upon her attorney of an intended application to the Court for leave to withdraw the petition. On the 16th of December she filed an affidavit that she has no means, and that during the pendency of the suit, her board, lodging, wearing apparel, and other necessaries had been provided for her at the expense of other parties.

Dec. 19. *G. Browne* moved for leave to withdraw the petition on the payment of the costs of the respondent and co-respondent.

Dr. Swabey, on behalf of the respondent, objected. The Court will not allow the petition to be withdrawn; but will order the husband to answer the petition for alimony.

1872. Jan. 23. THE JUDGE ORDINARY. The Court has come to the conclusion that the husband is entitled to have his petition dismissed on payment of costs. The circumstance of the wife having filed a petition for alimony, is not alone sufficient to stay the hands of the Court. If, indeed, she had done that promptly, the effect might have been different; but the original petition was filed in March, 1871, and the petition for alimony not until December. The petition must be dismissed on the husband paying all the wife's costs, including the motion as to the dismissal.

Attorneys for petitioner: *Johnson & Weatherall.*
Attorney for respondent: *W. Shaw.*
Attorney for co-respondent: *J. Tremellen.*

END OF MICHAELMAS TERM, 1871.

*CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

Jan. 15, 1872.

218] *JONES and WIFE v. CUTHBERTSON.

Law Reports, 7 Queens Bench, 218.

Parties to Action — Husband and Wife — Money had and received to use of the Husband and Wife — Money borrowed for Wife's separate use.

A married woman had property, freehold and leasehold, devised to her separate use, and she being desirous of building and repairing some cottages upon it, and her husband wishing to pay off a debt, it was arranged, under the advice of the defendant, a solicitor, that a loan of 550*l.* should be raised by the mortgage of the wife's property, and the deposit of two policies of 500*l.* each on the life of the husband and wife respectively. The mortgage was executed by husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by installments, and a joint authority, signed by husband and wife, was given to the defendant to receive the first installment of 150*l.* from the mortgagees. He received it, and paid the husband's debt by the authority of husband and wife, and he handed a small sum to them, but claimed to retain the balance for a previous debt due from the husband for professional services. Upon this an action was brought by husband and wife to recover the balance:—

Held, that the action was maintainable: for that the defendant, having full knowledge of the objects of the loan, one of which was to appropriate a sum to the separate use of the wife, received the money under the joint authority, as agent of the husband and wife to carry into effect those objects; and he could not, against their will, treat the transaction as a reduction into possession by the husband;

and the defendant, therefore, had no right to set up as an answer to the action that the money, when in his hands, was money of the husband alone.

DECLARATION by Thomas Jones and Rhoda Celia his wife, for money had and received by defendant to the use of plaintiffs, in right of the wife alone, she being then and still entitled to the same for her sole and separate use, and for the recovery of which she had a right to sue defendant.

Pleas: Never indebted, and payment.

Issue joined.

At the trial before Mellor, J., at the Glamorganshire Spring Assizes, 1871, a nonsuit was entered by consent with leave to move *to enter a verdict for the plaintiffs for 70*l.* 8*s.* 7*d.*, [219 the amount claimed.

The facts are fully stated in the judgment of the Court.

A rule was obtained accordingly, on the ground that, under the circumstances proved at the trial, the action might be brought by the husband and wife jointly.

1871. Nov. 20. *J. W. Bowen* and *G. B. Hughes* showed cause. The case comes within the rule laid down in 1 Roper's Husband and Wife, p. 220, 2d ed., adopted in 1 Williams' Executors, pp. 803–4, 6th ed., that when money owing to the wife has been actually received under the authority of the husband, or the joint authority of husband and wife, as in the present case the wife's interest in the property is changed, and there is a reduction into possession by the husband of the wife's chose in action, divested of her title to it upon surviving him; and he may maintain an action for the money so received. There are many cases which fully bear this out: *Huntley* v. *Griffiths* (1); *Tugman* v. *Hopkins* (2); *Bird* v. *Peagrum* (3). The fact that the husband expressly authorized the receipt of the money, at once distinguishes this case from the late case of *Fleet* v. *Perrins* (4), where the husband was in entire ignorance of the fund in question. *Abbot* v. *Blofield* (5), *King* v. *Basingham* (6), and *Bidgood* v. *Way* (7), show that money had and received cannot be maintained by husband and wife.

(1) Moore, 452.
(2) 4 M. & G., 389.
(3) 13 C. B., 639; 22 L. J. (C. P.), 166.
(4) Law Rep., 3 Q. B., 536; Law Rep., 4 Q. B., 500.
(5) Cro. Jac., 644.
(6) 8 Mod., 199.
(7) 2 W. Bl., 1236.

[LUSH, J. In *Bidgood* v. *Way* (1) and the other cases the wife's interest was not shown. Suppose a promissory note given to husband and wife, the action may be brought by the two.]

The wife's rights may, perhaps, be sustained in equity: *Sloper* v. *Cottrell* (2); but she has no rights at law. The true effect of the whole transaction was, that the husband borrowed the money, the wife consenting that her separate property should be encumbered as security. She therefore was simply surety, and at law the money, when received, was the husband's alone.

220 *H. S. *Giffard*, Q.C., and *B. Francis Williams*, in support of the rule. The points of law relied on for the defendant may be conceded, but they do not apply to the facts of this case. The money was received, no doubt, under a joint authority from husband and wife; but that is not all. The circumstances under which the money was borrowed, and the fact that the defendant was acting throughout as solicitor for the plaintiffs, with full knowledge of the objects for which the money was borrowed, at once distinguish this case from cases that have been or can be cited. The question is, whether a husband cannot assent to his wife's having an interest in personalty: *Philliskirk* v. *Pluckwell* (3) is a direct authority that he may do so if he chooses. The defendant, knowing, when he received this money, that it was borrowed with the express object of being applied to the wife's separate estate, he cannot be heard to say that he received it, not for the wife's use, but to the use of the husband alone. In *Fleet* v. *Perrins* (4), in the Exchequer Chamber, even Kelly, C. B., who differed from the rest of the Court as to the form of action, on the ground that money had and received would not lie by husband and wife, did not deny that an action might be maintained in some form or other by the wife's representatives.

Cur. adv. vult.

Jan. 15. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.), was delivered by

(1) 2 W. Bl. 1236.
(2) 6 E. & B., 497; 26 L. J. (Q. B.), 7.
(3) 2 M. & S., 393.
(4) Law Rep., 4 Q, B., at p. 516.

MELLOR, J. In this case Thomas Jones and Rhoda Celia, his wife, sued the defendant, who was an attorney and solicitor, to recover a sum of 70*l.* 8*s.* 7*d.*, received by him under the following circumstances.

The plaintiff Rhoda Celia Jones, having married the other plaintiff, Thomas Jones, in the lifetime of her father, became, on the death of the latter, devisee and legatee, under his will, of certain freehold and leasehold property, in Neath and Swansea, "to her separate use." The husband was indebted to Messrs. Franklyn and other persons, and he desired to obtain money to pay Franklyn's debt, while the wife wanted money to build or repair certain cottages on property which was included in the *devise to her contained in her father's will. [221 The defendant was their solicitor, and they, by the advice of his managing clerk, entered into a negotiation with some persons at Bristol, called the "Union Finance Company," for an advance of 550*l.* on the mortgage of the wife's separate property, and also upon two policies of insurance for 500*l.* each, one being a policy on the life of the wife, the other on the life of her husband. Both husband and wife executed the mortgage, and the husband entered into the usual covenants for the repayment of the loan to the mortgagees. It was part of the arrangement that the 550*l.*, agreed to be lent by the mortgagees on the above security, should be advanced by installments, the first installment being a sum of 150*l.* When that installment became due, an authority in writing was prepared by the defendant's clerk, dated the 1st of July, 1870, and signed by the two plaintiffs, being a joint authority by them to the defendant, to receive the money for them (1). The defendant, accordingly, by virtue of that authority, received the first installment, less the costs of the mortgagees' solicitors. He paid out of that installment, by virtue of a written authority, signed by the husband and wife, a sum of 28*l.* 4*s.* 10*d.*, being the debt due by the husband to Messrs.

(1) The authority was in these terms: "We, the undersigned, do hereby authorize you to receive of and from the Union Finance Company, Limited, Bristol, or their solicitors, the sum of 150*l.* (less solicitor's charges), being the first installment on account of loan of 550*l.* which the said company have agreed to lend us on the security of property, situate in Neath and Swansea, Glamorganshire, and for so doing this shall be your authority.

"Thomas Jones.
"Rhoda Celia Jones.

"1st July, 1870.

"To Mr. H. Cuthbertson, Solicitor,
"Neath."

Franklyn, and sent to the plaintiffs a cheque for 28*l.* 19*s.* 5*d.*, payable to the order of Thomas Jones, accompanied by a receipt for 139*l.* 17*s.*, being the amount of the first installment, less the costs of the solicitors of the mortgagees, and retained the balance in his hands in satisfaction of a debt due to him from the husband in respect of professional charges for business before done (1).

The defendant having refused to pay over the balance to the plaintiffs, this action was brought; and on the trial, these facts
222] *appearing, it was contended for the defendant that the plaintiffs could not recover, inasmuch as, under the circumstances, the installment, when received by the defendant under the joint authority to receive it, became, in point of law, the money of the husband only, and could only be sued for by him; in which case the defendant would have been able to set off the debt due to him from the plaintiff Thomas Jones. It was thereupon arranged, with the consent of the counsel on both sides, that the plaintiffs should be nonsuited, and that leave should be reserved to enter a verdict for 70*l.* 8*s.* 7*d.*, in the event of this Court being of opinion that they were entitled to recover in this action.

The case was argued in Michaelmas Term last, and the Court took time to consider its judgment. Many cases were cited on the argument in support of the general proposition stated in Bright's Law of Husband and Wife (vol. i, p. 53, c. 5, s. 2, par. 1), founded upon Roper's treatise on the same subject, viz., that "if the husband receives the fund which was owing to his wife, or if he, or he and his wife, authorize a person to receive it, who actually obtains it, either of such modes of receipt will change the wife's interest in the property, and will be a reduction of the chose in action into the possession of her husband, divested of her title to it upon surviving him; and he may maintain an action for the money so received by the person authorized (2)."

We do not doubt that the above passage contains a correct statement of the law, as applicable to the precise conditions specified in it; but it appears to us that the peculiar circum-

(1) The plaintiffs in their particulars of demand gave credit to the defendant for a further sum of 12*l.* 4*s.* 2*d.*, for his costs, leaving a balance of 70*l.* 8*s.* 7*d.*, the sum they claimed.

(2) See Roper on Husband and Wife vol. i, p. 220, 2d ed.

stances of the present case take it out of the operation of that rule, and distinguish it from the numerous authorities which were cited on the argument.

This is not, as was contended, a lending by the wife of the security of her separate estate for the benefit of her husband; but the effect of the transaction, as detailed in the evidence of the wife and her husband, was in substance this, viz., that the husband desired to discharge a debt due from him to Messrs. Franklyn, and that the wife desired to raise money for her own separate use, partly to repair and partly to build some cottages on her separate estate; and accordingly they, under the advice of the *defendant's clerk, became parties to the arrangement, [223 which was carried into effect by the mortgage; but it was not understood, or intended, either by the husband or the wife, that the money was to be raised for any other purpose than to provide means, as to part, to pay the debt due from the husband to Messrs. Franklyn, and, as to the residue, to be appropriated to the separate use of the wife. The defendant was well aware of all this, as the transaction was carried into effect through the instrumentality of himself and his clerk. When, therefore, the husband and wife signed the joint authority to the defendant to receive the first installment, he was well aware that, with the exception of the debt to Messrs. Franklyn, the residue of the money was to be applied solely for the benefit of the wife, and he became the agent of both the plaintiffs to carry that purpose into effect. The money, therefore, when received by him, was received simply as agent for the husband and wife, to carry into effect their several objects, and he could not, against the will of the parties, treat the transaction as a reduction into possession by the husband, on his own account, and for his own purposes; and he had no right, therefore, to set up, as an answer to the present action, that the money, when it got into his hands, was the money of the husband only.

It was argued on the part of the defendant, that the true effect of the facts was that, the wife having agreed to incumber her separate estate, and the husband having deposited a policy of assurance on his own life, and entered into a covenant with the mortgagees to repay to them the entire amount of the sum secured, whereby he became primarily liable to the mortgagees, the wife stood in the nature of a surety only: and that under

these circumstances the installment, so soon as it got into the hands of the defendant, became immediately, in point of law, the money of the husband. If indeed the money had been raised for the husband's benefit only, and the wife had merely incumbered her separate estate in order to enable him to raise the money, the contention on the part of the defendant would have been justified, and the money then would have been received by the defendant discharged of any trust for the separate benefit of the wife, and it would have been in his hands the money of the husband only.

In equity it is well settled that a wife, entitled to property de-
224] *vised or bequeathed to her separate use, is considered as a feme sole as to all dealings with such property; and, although at law, she is in general incapable of contracting with her husband, still, in relation to transactions affecting her separate estate, there appears to be no doubt that she may enter into arrangements with her husband, or with other parties, for creating incumbrances or for making any other disposition of that estate, and designating the amount or the terms on which she may be disposed to join in a security like that which was given in the present case.

If the transaction takes the form of raising a loan for her husband, she is in equity treated as a surety to the extent to which she incumbers her separate estate, and is entitled to be reimbursed out of his estate; but if the transaction is one wholly or partially for her own separate use and benefit, there can be no reason why she should not enter into stipulations with her husband relating thereto; and we think that this was the effect of the transaction in question, and that the defendant, when he received the money by virtue of the joint authority of husband and wife, could not, contrary to the agreement and intention of the parties, treat the money so received as the money of the husband alone. The receipt by him could not, under the circumstances, operate as a reduction into possession by the husband, and was not, indeed, in the sense used in the authorities, a chose in action of the wife which the husband could by any act of his own reduce into possession.

It is unnecessary to refer to the numerous cases which were cited on this argument, inasmuch as none of them depend upon circumstances at all analogous to the present case.

Our judgment will therefore be, that the verdict be entered for the plaintiffs, pursuant to the leave reserved, for the sum of 70*l.* 8*s.* 7*d.*

Rule absolute.

Attorneys for plaintiffs: *Bell, Brodrick & Grey.*
Attorney for defendant: *E. Peacopp.*

Feb. 16, 1872.

[*IN THE EXCHEQUER CHAMBER.] [225

NOTARA and another v. HENDERSON and others.

Law Reports, 7 Queens Bench, 225.

Ship and Shipping — Duty of Master or Shipowner as to Goods damaged on the Voyage by excepted Perils — Duty to unload dry and re-ship Cargo — Measure of Damages.

There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master the shipowner is responsible to the shipper.

The plaintiffs shipped beans on board the defendants' ship, under a bill of lading, from Alexandria to Glasgow, with leave to call at intermediate ports, deliverable to plaintiffs' order on payment of freight by consignees. The ship called at Liverpool, and in going out met with a collision (a peril excepted in the bill of lading), and was obliged to put back for repairs, which detained her a few days. The beans were wetted by sea water in consequence of the collision; and the plaintiffs, being at Liverpool, offered to receive them there, paying freight pro ratâ; but the defendants' agent refused to deliver them without being paid full freight; and the beans were carried on to Glasgow; and on their arrival there they were much deteriorated in value, beyond what they would have been by the mere wetting from the collision, if they had been dried instead of being carried on as they were. The beans might have been removed at Liverpool from the ship to warehouses and spread out and dried, and there was warehouse accommodation within half a mile of the dock in which the ship was; and by this means the decomposition would have been materially arrested or mitigated. The cost of unshipping, drying, and re-shipping, would have been particular average, payable by the shippers. The plaintiffs' brought an action against the de-

fendants, claiming the amount of the extra depreciation. On a case disclosing the above facts, the Court having power to draw inferences:—

Held (affirming the judgment of the Court of Queen's Bench), that the facts showed that the beans might have been taken out and dried (which was clearly a proper thing to do on behalf of the owners), and then re-shipped, without unreasonably delaying the whole adventure; that it was, therefore, the master's duty to have done so, and consequently the defendants were liable.

Semble, that the measure of damages was the amount of extra depreciation in value in consequence of the neglect to dry the beans, after allowing the estimated expense of unshipping, drying, and re-shipping.

ERROR on the judgment of the Court of Queen's Bench in favor of the plaintiffs on a special case.

226] *The case is stated at length in the report in the Court below.(1) The facts fully appear in the judgment.

1871. June 13. *Field, Q.C.* (*C. Hutton* with him), for the defendants.

Milward, Q.C. (*Dicey* with him) for the plaintiffs.

The arguments sufficiently appear from the judgment of the Court.

The following cases were cited for the defendants: *The Gratitudine* (2); *Tronson* v. *Dent* (3); *Worms* v. *Storey* (4); *Blasco* v. *Fletcher* (5); *Jordan* v. *Warren Insurance Co.* (6); *Charleston Steamboat Co.* v. *Bason* (7); *Soule* v. *Rodocanachi* (8); *Ewbank* v. *Nutting* (9); *Palmer* v. *Lorillard* (10); *King* v. *Shepherd* (11); *Laveroni* v. *Drury.*(12)

For the plaintiffs were cited: *Bird* v. *Cromwell* (13); *Steamboat Lynx* v. *King* (14); *Niagara* v. *Cordes.*(15)

Cur. adv. vult.

Feb. 16. The judgment of the Court (Kelly, C.B., Martin, Channell, and Cleasby, B.B., Willes, Byles, and Keating, JJ.), was delivered by

WILLES, J. This is an action by the shippers of beans on

(1) Law Rep. 5 Q.B., 346.
(2) 3 Rob. Adm., 240, 259.
(3) 8 Moo. P. C., 419, 449.
(4) 11 Ex., 427; 25 L. J. (Ex.), 1.
(5) 14 C. B. (N.S.), 147; 32 L. J. (C.P.), 284.
(6) 1 Story, U. S. R., 342.
(7) Harper, 262.
(8) 1 Newberry, Adm. R., 504.
(9) 7 C. B., 797.
(10) 16 Johns. U. S. R., 348.
(11) 3 Story, U. S. R., 349.
(12) 8 Ex., 166; 22 L. J. (Ex.), 2.
(13) 1 Misso., 81.
(14) 12 Misso., 272.
(15) 21 Howard, U. S. R., 7, 28.

board a steamship called the *Trojan*, for a voyage from Alexandria to Glasgow, against the shipowners, for an alleged neglect of the master to take reasonable care of the beans by drying them at Liverpool, into which port the vessel was driven for repairs, by an accident of the sea, from the direct and proximate effect of which, the beans were wetted; and from the remote effects of which, for want of drying, they were further seriously damaged.

The bill of lading was subject, amongst other exceptions, to the following, viz: "loss or damage arising from collision or other *accidents of navigation occasioned by default of [227 the master or crew, or any other accidents of the seas, rivers, and steam navigation, of whatever nature or kind, excepted;" and it gives "liberty during the voyage to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever."

The vessel in the course of her voyage stopped at Liverpool, and on the 24th October, 1868, on her way out, came, without any fault, into collision with another vessel. The result of the collision was that she was driven ashore in an exposed place, where the beans became soaked with salt water, and the vessel herself received an injury which made it necessary that she should put back to Liverpool for repairs. She was there put into a graving dock for that purpose on the 27th, and temporarily repaired, in order to proceed to Glasgow. For the purpose of lightening the ship, and to facilitate the repairs, about one-fourth of the beans were transshipped into lighters, and for a like purpose other part was removed and spread out in the after part of the ship. When the ship was repaired, the beans were, without being dried or otherwise looked after, replaced in the wet state. On the 30th of October the ship proceeded to Glasgow. The beans were materially damaged by not being dried at Liverpool.

The beans might, at Liverpool have been removed to warehouses for the purpose of being spread out and dried, and such accommodation might have been found within half a mile of the graving dock. This would have caused a material benefit to the beans, and materially checked the process of decomposition. The expense of unshipping, drying, and reshipping, according to the finding in the case, which must be regarded

as a finding in fact, would have been particular average, payable by the owner of the cargo; and that must be taken, therefore, to have been a reasonable and proper course to pursue, so far as the shippers' interest was concerned.

It is not stated in the case what risk, trouble, expense, or delay, the drying would have caused. In the absence of any statement that either was unreasonable, and acting upon the power of "drawing inferences" given by the special case, the Court below appear to have arrived at the conclusion of fact, that the unshipping, drying and reshipping of the cargo were, under 228] the *circumstances, as to time and otherwise reasonable and proper acts to be done by the person having charge of the cargo, assuming that there was any legal duty imposed upon him to take active steps for that purpose.

During the stay of the vessel at Liverpool, the shippers, who were on the spot, called the shipowners' attention, through their agent also on the spot, to the state of the beans, and to the fact that they would be seriously injured unless dried at once, and they requested that either the beans should be taken out and dried, and then reshipped for Glasgow, or that they should be delivered at Liverpool at a proportionate freight, so that the shippers might dry them for themselves. The shipowners refused to accede to either alternative. They offered to deliver at Liverpool, upon being paid the whole freight; but insisted that, unless the whole freight was paid, they had a right to retain and carry on the beans, undried, and getting worse for want of drying, as they were, in order to earn the whole freight upon arrival at Glasgow, provided the beans arrived in specie, whatever might be their condition.

The shippers refused to pay more than the freight pro ratâ, and the shipowners took on the beans without drying them, and thereby occasioned further damage to the beans, which, quite exclusive of the damage proximately and necessarily caused by the collision, and limited to the consequence of the neglect to dry (of course calculated after allowing for the estimated expense of unshipping, drying, and reshipping), has by consent been assessed at 666*l.* 1*s.* 5*d.* ([1]).

([1]) After judgment had been given for the plaintiff in the Queen's Bench, an average-stater was appointed under a judge's order, *by consent of the parties*, to assess the damages, being the difference between the damage which the beans would probably have sustained if unshipped and dried at Liver-

The value of the cargo at Glasgow, but for the collision and its results, proximate and remote, would have been 3500*l.* The value in the state in which it arrived was 1167*l.* 7*s.* 8*d.* The entire loss caused, whether proximately or remotely, by the collision was, therefore, 2332*l.* 12*s.* 4*d.*, out of which the remote loss caused by *neglect to dry amounts to 666*l.* 1*s.* 5*d.* The [229 shippers do not claim in respect of the damage necessarily caused by the collision and its unavoidable results, but only for the estimated aggravation of that damage by reason of nothing having been done in the way of drying to arrest or mitigate decomposition, and for that amount (666*l.* 1*s.* 5*d.*) they obtained judgment in the Court of Queen's Bench. (1)

Upon that judgment the shipowners have assigned error, alleging that they were entitled to retain and take on the beans in their wet state, and were not bound to do anything to check the damage occasioned by the collision.

The case was very fully and ably argued by Mr. Field for the defendants and Mr. Milward for the plaintiffs, before the Lord Chief Baron, Martin, Channell, and Cleasby, BB., and Willes, Byles and Keating, JJ.; and we took time to consider our judgment.

The question thus raised is a compound one of law and fact; first, of law, whether there be any duty on the part of the shipowners, through the master, to take active measures to prevent the cargo from being spoilt by damage originally occasioned by sea accidents, without fault on their part, and for the proximate and unavoidable effects of which accident they are exempt from responsibility by the terms of the bill of lading; and secondly, of fact, whether, if there be such a duty, there was, under the circumstances of this case, a breach thereof, in not drying the beans.

The law, up to a certain point, is clear and well settled by authority. The shippers, though upon the spot, were not entitled to the possession of the beans for any purpose without paying the full freight to Glasgow. That freight was not due, but the shipowners were entitled to retain the goods as a security for earning it. The offer of pro ratâ freight may have been rea-

pool and the damage which they actually sustained by being carried on to Glasgow. The arbitrator awarded 666*l.* 1*s.* 5*d.*, and judgment was afterwards entered for that amount.

(1) See note ante.

sonable, but it was one which the shipowners were not bound to accept: and it must be treated as an attempt to compromise, not affecting the rights of the parties, though it may bear upon the reasonableness of the course pursued, assuming such reasonableness to be material in determining the question of neglect.

It was argued for the shipowners that the fact of the shippers being upon the spot negatived any implied duty on the part of 230] the *master, as agent of necessity, to take care of the goods; but this argument will not bear examination. The shippers were present, but they could not lawfully touch the goods without leave. The shipowners refused to let them do so without payment of a sum not yet earned, and insisted upon retaining the goods, with the rights, and consequently the duties, of the original bailment, whatever those might be. The shippers thereupon insisted upon the goods being properly taken care of by the shipowners, who retained the control of them as a pledge for their freight.

That a duty to take care of the goods generally exists cannot be doubted; and the question raised is, whether it extends to incurring expense and trouble in preserving the cargo from destruction or serious deterioration from the consequences of sea accident, for which originally the shipowners were not liable, by unshipping and drying it, where that is a reasonable and ordinary course to take, and would certainly have been adopted by the shippers if the whole adventure had been under their control and at their risk.

It is remarkable that, upon a question so familiar to persons conversant with maritime affairs, and which has so constantly to be considered from another point of view in settling claims upon policies of insurance, the reported authorities in this country, so far as regards the mutual rights and liabilities of shipper and shipowner, should be so rare. The only case in which it was much discussed is that of *Tronson* v. *Dent*. (r) That was an action by shipper against master for non-delivery of goods pursuant to a bill of lading. The vessel, the *Erin*, left Calcutta for Hong Kong partly laden with opium, suffered damage by collision, and was obliged to put into Singapore for repair. The repair lasted twelve days. Part of the opium was

(r) 8 Moo. P. C., 419,

damaged by salt water to such an extent that the master, acting honestly, thought proper to sell it, and the amount realized by the sale was paid into court. The shipper, however, insisted upon recovering the value of the opium at the port of discharge, and proceeded to trial, where evidence was given that the opium might have been carried on in specie — at least, if dried during the stay for repairs. The Chief Justice directed the jury in effect that, if the master could "with *reasonable exer- [231 tion" have brought on the damaged opium in the marketable state of opium, either in the *Erin* or in some other vessel, he should have done so. The jury found for the plaintiff, and an appeal was brought to the Judicial Committee upon, amongst other grounds, misdirection, and that the verdict was against the weight of evidence. The direction was criticised in the judgment delivered by Sir John Patteson as follows (r): "An objection that is made to his summing up is with respect to these words, 'with reasonable exertion;' and it is assumed that, by the words 'reasonable exertion' he told the jury that it was the master's duty to have transshipped the goods, or at least, that it was his duty to have dried the opium; and if it took two months to have dried the opium, it was his duty so to have done after he himself had left the place, because he clearly was not bound to keep the ship there for the purpose of doing so. If the ship could have been repaired in twelve days, of course he could have gone on at the end of those twelve days; but he was bound to get somebody to attend to the drying of the opium, and then to forward it to Hong Kong. I think it is a great stretch of ingenuity to say the words 'reasonable exertion' mean all that. I do not know what the words 'reasonable exertion' actually and necessarily import, but certainly there was some exertion which it was the master's duty to have made on that occasion. It is stated, I think, by foreign authorities, that it is the master's duty to transship; but doubt is raised as to that; and in our courts it should seem to be considered that he is quite at liberty to do so, and that, if he does transship, he would be protected in doing so, if it turns out, in the opinion of the jury, that it was the proper course of dealing with the goods, but that he is not positively bound to do so. If his own ship cannot carry them on at all, he may

(r) 8 Moo. P. C, at pp. 455–7.

either leave goods which are not perishable, or sell goods which are in their nature perishable, which cannot be carried on, which must, of course, be sold; but that is not the case here. But although he may not be bound to transship, he is at liberty to do so. In other cases it has been held that he ought to take all proper care of the cargo; but there is no authority that I know of which distinctly shows that he is bound 232] to lay out a great deal of *money in order to endeavor to repair the damage done to the cargo, either by drying or in any other way. While the cargo is there, he may not have the means of doing so. He is bound to ventilate it, and so on; but that, I apprehend, is while it is on board the ship. And I think, if I am not mistaken, there is some case of a ship in Ireland, where there was a cargo of corn, and the question was, whether it could be kiln-dried, and whether the master was bound to kiln-dry it there. The case did not turn on whether he was bound to do so; but, if I remember the case, he had done it, and the question was, whether he was at liberty to do so. It was clear he was at liberty to do so; and here he would have been at liberty to have taken steps to dry this opium during the twelve days he was at Singapore. Whether he was bound to do it or not need not be determined in this case; nor do I find that it was laid down by the judge, at least, I cannot collect from his language here that he laid down to the jury that the master was bound to do any such thing, but merely that he was bound to use reasonable exertion to have brought the opium on. It is, in order to be carried on, taken out of the vessel; therefore, if by reasonable exertion he could have dried the outside of the chests, and put them back into the vessel afterwards to be taken to Hong Kong, he was bound surely to use that 'reasonable exertion' at all events" . . . "On the whole question I think we should be justified in saying, that he really did tell the jury that he was not bound to transship or to lay out a great deal of money in the drying of the opium, but that he was bound to carry it on if it could be carried on in a merchantable state." Upon this construction the direction was sustained and the judgment was affirmed.

This judgment of the Judicial Committee, though it does not define the duty of the master, does not disaffirm his duty to take

reasonable care, whether passive or active, to save and preserve a cargo damaged by sea accidents.

The effect of the decision appears to be, that the duty of the master to use "reasonable exertion" to preserve the goods, if necessary, by drying them, so as to make them capable of being taken on in specie, was recognized, though the limits of the duty were left unsettled. It was suggested, indeed, that the duty of taking active measures, such as ventilating the cargo, ordinarily applied to doing so on board the ship, and that under no circumstances *was the master bound to lay out a [233 "great deal of money" (limit not stated) in drying the cargo. It was assumed that the master was not bound, under the circumstances of that case, to delay beyond the time necessary for the repairs of the vessel. This assumption, however, can hardly be taken as intended for a proposition of law universally applicable but rather as applicable to the circumstance that the opium then in question was only a part of the cargo, and that delay would be unreasonable to persons equally entitled to consideration as the plaintiff.

The existence of such duty to take active measures for the preservation of the cargo from loss or deterioration in case of accidents is, however, distinctly recognized in the maritime law in one important particular,— wherein it follows the civil law, which, though it be not recognized as jus commune, either here or abroad, in mercantile or maritime affairs (see Baldasseroni, leggi del cambio, 31) has been the source of many valuable rules,— namely, that the master may incur expense for the preservation of the cargo, and may charge such expense against the owner of the cargo in the form of particular average. This maritime right is, in one point of view, analogous to that of salvage, and it may be urged that the services in respect of which it is rendered should, as in the case of salvage, be looked upon as optional and not obligatory. There is, however, this marked distinction, that the master, as representing the shipowner, has the charge of the goods under contract for the joint benefit of the shipowner and shipper, and falls within the class of persons who are under obligation to take care of and preserve the goods as bailees (Pothier, Obligations, art. 142, and Nantissement, art. 29 et seq., and as to extraordinary expenses, art. 60, 61; and also under the special head of care imposed

upon masters, Louages Maritimes, Charte-partie, art. 31). This obligation on the part of the master has been commonly recognized, both in respect of preserving goods on board in a state of safety by pumping, ventilation, and other proper means, and of saving goods which by accident have been exposed to danger. Thus, even in case of wreck, it is laid down, in a work on sea laws, approved by Lord Stowell (1), that the master "ought to preserve the most valuable goods first, and by atten-
234] tion and presence of *mind endeavor to lessen the evil; and save, or help to save, as much as possible:" Jacobsen, book 2, chap. i, p. 112. It is recognized in the French Code generally in Article 222; and as to the right to charge the cargo with particular average for extraordinary expenses incurred to preserve it, in Article 403 [2]; in the Spanish Code in Article 935 [1] as to like expenses; and in the German Mercantile Code, with its usual good sense and fullness, in Article 504; where the duty of the master to take care of and preserve the cargo for its owners, at their expense (Article 722), in case of accident, and for avoiding or *lessening* the loss thereby occasioned, is specially enforced and provided for, to an extent, perhaps, beyond what our own law has yet been held to recognize. The master is to take every possible care of the cargo during the voyage, in the interests of all concerned. When special measures are required to avoid or lessen a loss, he is to protect the interests of the owners of the cargo, as their representative, under their direction, if possible, otherwise according to his own discretion, giving an account of what he has done. He is, in such cases, specially authorized to discharge all or part of the cargo. In extreme cases to avert considerable (erheblicher) loss, on account of imminent deterioration or other causes, he may resort to sale or hypothecation, to procure means for its preservation or transport. He is to reclaim it in case of capture or detention, and to take all extrajudicial or judicial steps for its recovery, if otherwise taken out of his charge.

There are unquestionably cases in which the exercise of such a duty would be incumbent upon the master, as representing the owners of the ship and for their interest. As, for instance, in the case of a perishable cargo so damaged by salt water that it could not, in its existing state, be taken forward in specie to

(1) 1 Hagg. Adm., at p. 232.

the port of discharge, so as to earn the freight, but which could, at an expense considerably less than the freight, be dried and carried on. In such a case, to earn the freight, it might be for the interest of the owner of the ship to save the cargo by drying. To sell it or abandon it, would give no right to freight pro ratâ against the owner of the cargo, nor any right to recover against the underwriter upon freight: *Mordy* v. *Jones* (1), recognized in *Philpott* v. **Swann* (2). In *Mordy* v. *Jones* (3) the cargo was [235 so damaged that it would have cost more than the freight, though less than the value of the cargo, to restore it, and no question arose as to the right of the owner of the cargo, because he consented to the sale. But we are at present supposing a case in which it would have been for the shipowner's interest to dry and save the goods; as, if the freight were 1000*l.*, the expense of drying 100*l.*, and the rest of the voyage so long that, but for the drying, fermentation would destroy the specific character of the cargo before arrival. In such a case, if the process were also for the benefit of the owner of the cargo, the expenses would have fallen, according to the ordinary practice, upon the cargo as particular average. It is clear, therefore, that there are cases in which it is the duty of the master to save and dry the cargo, even as between him and his owner, though the expense of his performing that duty fall upon the cargo saved. Can it be that this duty of taking care of the cargo by active measures, if necessary, at the expense of the cargo, is owing only to the shipowner, or that it is other than a duty to take reasonable care of the cargo, both in its sound state and in arresting the damage to which it has become liable by accidents of the sea, for the benefit of all who are concerned in the adventure?

In the result it appears to us that the duty of the master, in this respect, is not, like the authority to transship, a power for the benefit of the shipowner only to secure his freight, *De Cuadra* v. *Swann* (4), but a duty imposed upon the master, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking reasonable measures to check and

(1) 4 B. & C., 394.
(2) 11 C. B. (N. S.), at p. 281; 30 L. J. (C. P.), at p. 360.
(3) 4 B. & C., 394.
(4) 16 C. B. (N. S.), 772

arrest their loss, destruction, or deterioration, by reason of accidents, for the necessary effects of which there is, by reason of the exception in the bill of lading, no original liability.

The exception in the bill of lading was relied upon in this court as completely exonerating the shipowner; but it is now thoroughly settled that it only exempts him from the absolute liability of a common carrier, and not from the consequences of
236] *the want of reasonable skill, diligence, and care, which want is popularly described as "gross negligence." This is settled, so far as the repairs of the ship are concerned, by the judgment of Lord Wensleydale in *Worms* v. *Storey* (1); as to her navigation, by a series of authorities collected in *Grill* v. *General Iron Screw Collier Co.* (2); and as to her management, so far as affects the case of the cargo itself, in *Laurie* v. *Douglas* (3); where the Court (in a judgment unfortunately not reported at large) upheld a ruling of Pollock, C. B., that the shipowner was only bound to take the same care of the goods as a person would of his own goods, viz., "ordinary and reasonable care." These authorities and the reasoning upon which they are founded are conclusive to show that the exemption is from liability for loss which could not have been avoided by reasonable care, skill, and diligence, and that it is inapplicable to the case of a loss arising from the want of such care, and the sacrifice of the cargo by reason thereof, which is the subject-matter of the present complaint.

It was also argued, that if there was any default of duty, it was the fault of the master exclusively, and not of the shipowners. This argument might have had some plausibility, if the vessel had been wrecked or abandoned, and the objectionable conduct of the master had not taken place in the course of his employment and for the supposed benefit of his owners. The master is the general agent of the owner for the purpose of the voyage, and for the exercise of that agency is intrusted with powers, to be used at his discretion, in which the owner who selects him is satisfied to confide. If, therefore, the master exercises a power which circumstances might justify, so that it is within the general scope of his functions, and it turns out that the facts

(1) 11 Ex., at p. 430; 25 L. J. (Ex.), at p. 8.
(2) Law Rep., 1 C. P., 600; Law Rep., 3 C. P., 476.
(3) 15 M. & W., 746.

do not warrant its exercise in the particular instance, as for instance, if he unnecessarily throw goods overboard in a panic, or sell goods without justifying need, the owners are held liable for his acts, according to the rule, "Omnia facta magistri debet præstare qui eum præposuit:" Pothier, Louages Maritimes, 48; *Ewbank* v. *Nutting* (1); and for a like reason they must be liable for his culpable omissions.

*For these reasons we think the shipowners are answerable for the conduct of the master, in point of law, if, in point of fact, he was guilty of a want of reasonable care of the goods in not drying them at Liverpool. [237

This raises, in the end, the question of fact, whether there was a breach of the duty thus affirmed, a question which, though properly one for a jury, we are, under the power given in the special case, to draw inferences of fact, and the 32d section of the Common Law Procedure Act, 1854, bound to determine. It is obvious that the proper answer must depend upon the circumstances of each particular case, and that the question, whether active special measures ought to have been taken to preserve the cargo from growing damage by accident, is not determined simply by showing damage done and suggesting measures which might have been taken to prevent it. A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty, whether it be for the joint benefit of the shipowner and the shipper, or for the benefit of the shipper only, could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call, for purposes connected with the voyage though not necessary for its completion, which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience, must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an

(1) 7 C. B., 797.

unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty.

In the present case the circumstances affecting the propriety of drying the beans are not stated in detail, and a good deal is left to our general knowledge and experience. It is common knowledge that beans are a cargo which specially suffers from damp, that the effects of the damp spread and are aggravated 238] from hour *to hour, that such a cargo, therefore, if damp, ought to be dried, if reasonably possible, and not sent on in a state of fermentation. It must be taken from the finding as to particular average, that such drying would have been a reasonable and prudent course in the interest of the shippers, and one which they would have been sure to take if they had been owners of the whole adventure. The facts stated are all in favor of the conclusion that the beans might have been dried, during an insignificant delay, at a moderate expense, which there would have been no difficulty in providing from or upon the credit of the shippers; and no circumstance is stated to show any special risk, trouble, inconvenience, or other objection. The master thought proper, as he was entitled to do, to reject the offer of the shippers to take the beans out of his hands upon terms not unreasonable, and insisted, as he was entitled to do, upon keeping them in pledge for the future freight; and having done so, he thought proper to reship and replace a large part of them and put to sea with them in a state in which no prudent or reasonable man would have shipped or put to sea with them taking the risk of their arriving at Glasgow just in the state of beans, so as to carry full freight for the shipowners, but largely deteriorated by the fermentation during the transit.

We thus agree with the Court below, that the duty exists in law, and that, under the circumstances, the breach of duty is sufficiently made out in fact, and that the defendants, as shipowners, are liable in damages.

The judgment of the Court of Queen's Bench must therefore be affirmed.

Judgment Affirmed.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Raivle.*
Attorneys for defendants: *Markby & Tarry.*

Jan. 31, 1872.

*Dunn and another v. The Company of Proprietors of the Birmingham Canal Navigation. [244

Law Reports, 7 Queen's Bench, 244.

Canal Company — Rights and Liabilities as between Canal Company and Owners of subjacent Mines.

The defendants' canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another clause, the owners were not to work the minerals without giving three months notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them.

Plaintiff was owner of mines under the canal, and gave defendants proper notice of his intention to work them: defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskillful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The *defendants were guilty of no actual carelessness in the management [245 of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.

The plaintiff thereupon brought an action, charging that defendants, having brought water into the canal, so improperly managed the canal and the water, that it escaped and flooded plaintiff's mine. On the above facts, the Court having power to draw inferences :—

Held, by Cockburn, C.J., Mellor and Lush, JJ., that an action of tort could not be maintained.

Semble, by the same judges, that the plaintiff was entitled to compensation under the Act for the loss of his coal.

Hannen, J., being of a contrary opinion on both points.

DECLARATION, that plaintiffs were lawfully possessed of a coal mine, and that defendants brought water into a canal near the coal mine, and so carelessly and improperly managed the canal and the water therein, that the water escaped into and flooded the coal mine whereby the mine was damaged.

The material pleas were: 1st. Not guilty. 2dly. That plaintiffs were not possessed as alleged. 3dly. Except as to the charge of negligence and improper conduct, that the water was brought into the canal in pursuance of certain Acts of Parliament, authorizing the construction and maintenance of the canal. That the coal mine near to and under the canal was not worked till after the completion of the canal, and that the water escaped out of the canal into the coal mine without any negligence or default on defendants' part. Issue joined.

At the trial before Montague Smith, J., at the Worcester Summer Assizes, 1869, a verdict was taken for the plaintiffs subject to a case to be stated by an arbitrator.

1. By a Local Act, 16 Geo. 3, c. 66 (herein called "The Dudley Canal Act)," certain persons were incorporated by the name of "The Company of Proprietors of the Dudley Canal Navigation," and full powers were given to them to construct and maintain a canal in the parish of Dudley, in the county of Worcester and Kingswinford, in the county of Stafford.

2 and 3. The following parts of the Act were referred to in argument or judgments of the Court. [The sections of the Act are not numbered, the numbers refer to the pages.]

246] *The Act recites (p. 1587), that the making and maintaining of a canal for the navigation of boats, &c., as therein described, would "render the carriage of coal, ironstone, and limestone, from several mines, in that part of the country, and divers other goods and merchandise, much easier and cheaper than at present, which would be of great advantage to the trade and manufactures" of the district, and of the towns and countries therein named, and that certain persons therein named were willing to undertake the construction and maintenance of the said canal; it creates those persons a company, with perpetual succession, to construct and maintain the canal, and to supply the same with water from certain streams and watercourses, and to make reservoirs, feeders, and aqueducts, for supplying the said canal with water, and to make various other works which

they might think requisite and convenient for the purposes of the said navigation, and also (p. 1591) from time to time to alter, repair, amend, widen or enlarge the same, and to do (p. 1592) all other matters and things which they should think necessary or convenient for the making, effecting, preserving, improving, completing, and using the said navigation, they and their successors "doing as little damage as may be in the execution of the powers granted to them, and making satisfaction in manner hereinafter mentioned, for all damages to be sustained by the owners, or proprietors, of such lands, tenements, or hereditaments, waters and watercourses, brooks or rivers, respectively, as shall be taken, used, removed, diverted, or prejudiced in or by the execution of all or any of the powers of this Act; and this Act shall be sufficient to indemnify them, their workmen, &c., for what they shall do by virtue of the powers hereby granted." It empowers (pp. 1599, 1600) bodies politic, corporate, collegiate and other persons under various disabilities, and all other persons, "to contract for, sell, and convey to the company, for the use of the said navigation, any lands or grounds which shall be set out and ascertained."

After reciting (p. 1601) that "differences may arise between the said company of proprietors and the several owners or persons interested in lands, grounds, tenements, hereditaments, or waters which shall or may be affected or prejudiced by the execution of any of the powers hereby granted, touching the purchase-money to be paid, or recompense to be made to them respectively," the Act proceeds to constitute and incorporate a large body of persons named, and their successors (p. 1602) to be "commissioners for the settling, determining, and adjusting all questions, matters, and differences, which shall or may arise between the said company, and the several proprietors of and persons interested in any lands, grounds, tenements, hereditaments, or waters that shall or may be affected or prejudiced by the execution of any of the powers hereby granted." It then (pp. 1603, 1604) empowers the said commissioners, or any five of them, in manner and by the means therein mentioned, "to determine and adjust, from time to time, what distinct sum of money shall be paid by the company, either by an annual rent or payment, or by a sum of money in gross, to and at the election of the several bodies politic, &c., and other persons who shall be entitled or interested as aforesaid, for the absolute purchase of the lands or grounds which shall be set out and ascertained for making the said canal, or any part thereof, and other purposes in this Act mentioned; and also to determine and adjust what other distinct sum or sums of money shall be paid by the said company, their successors, &c., as a recompense for any damages which may or shall be at any time or times whatsoever sustained by such bodies politic, &c., or other person or persons *respectively, being owners of or interested in any lands, grounds, [247 tenements, hereditaments, and waters, for or by reason of the making, repairing, or maintaining the said canal, or of any reservoirs, &c., and supplying the same or any of them with water as aforesaid, or by the flowing, leaking, or oozing of the water over or through the banks of the said canal, reservoirs, trenches, or sluices, . . . or by turning or diverting any streams or brooks into the same, or by reason or means of the execution of any of the powers herein contained by the said company, their successors and assigns," &c. . . . And if (pp. 1604, 1605) either party is dissatisfied with the decision of the commissioners, a jury is to be summoned; and (p. 1608) the commissioners shall not be obliged to receive or take notice of any complaints by any person for any injury or damage by him sustained, "unless application hath been or shall be made to the company, their successors, &c., or their agents, within six calendar months next after the time

such supposed injury or damage shall have been sustained, or the doing or the committing thereof shall have ceased."

All persons (p. 1633) whatsoever shall have free liberty . . . to navigate upon the said canal, with any boats or other vessels, not exceeding seven feet in breadth; . . . and also to use the towing-paths with horses, for pulling and drawing such boats and vessels; upon payment of certain tolls.

"No owner (pp. 1640, 1641) or proprietor of any mines or minerals, their workmen or servants, or other person whatsoever, shall open or carry on any work for digging, getting, or discovering such mines or minerals under any tunnel, or within twenty yards of the same, without the consent of the company, their successors or assigns. . . . And no owner, &c., of mines or minerals, shall on any account whatever open, dig, sink, or carry on any work for the getting of coal, limestone, ironstone, or mineral within the distance of twelve yards from the said intended canal or any reservoir, &c.; nor shall any coals or other minerals be got under any part of the said canal, towing paths or reservoirs, or within or under any land lying within the distance of twelve yards of either side of the said canal, reservoirs, or other works, except as hereinafter mentioned, without the consent of the said company in writing under their common seal."

Provided (pp. 1642, 1643) "that when and so often as the owner of any coal mines, &c., or other minerals lying under the said canal, &c., or within the distance hereinbefore limited, shall be desirous of working the same, then and in every such case, such owner shall give to the said company three calendar months' notice in writing before he shall begin to work such mines, &c. And upon receipt of such notice it shall be lawful for the company to cause such mines to be inspected in order to determine what coal or other minerals may be come at and actually gotten without prejudice or damage to the canal; and if the company shall fail or refuse to cause such mines to be inspected, within thirty days after the receipt of such notice, then it shall be lawful for the owners of such mines, and they are hereby authorized, to work and get such part of the said mines as lie under the said canal, &c., or within the distance aforesaid; and if upon such inspection the company shall refuse to permit the owners of the said mines to work such part of the same as lie under the canal, &c., or within the distance aforesaid, as they might from time to time have come at and actually gotten, or in any other manner obstruct or prevent them from getting the same, then the said company within three calendar months after such refusal or obstruction shall pay to the owners, proprietors, or workers of such mines re-
248] spectively, such price for the same, *in proportion to their several interests therein, as the next adjoining mines of equal quality should have been really and bonâ fide sold for, or be estimated or valued at;" and in case of disagreement touching any or either of the matters aforesaid, then the same shall be settled by the commissioners or any five of them or by the verdict of a jury if required in manner thereinbefore provided for ascertaining the value of land, &c.

"Provided (p. 1657) that nothing herein contained shall extend or be construed to extend to defeat, prejudice, or affect the right of any lord or lords of any manor or manors, common or waste grounds, or of any owner or owners of any lands or grounds in, upon, or through which the canal and towing-paths, &c., or any of them shall be made, to the mines, minerals, or quarries, lying or being within or under the lands or grounds to be set out or made use of for such canal towing-paths, &c.; but all such mines, minerals, and quarries are hereby reserved to such lord or lords of such manor or manors, or of such commons or waste grounds, and to such owner or owners of such lands or grounds respectively, their heirs and

assigns; and that it shall and may be lawful to and for the lord or lords of such manor or manors, common or waste grounds, or such owner or owners of such lands or grounds respectively (subject to the conditions and restrictions herein contained) to work all such mines and quarries, and to take and carry away all such coals, iron, stone, and minerals, as shall be gotten therein, to his and their own use; provided that in working such mines and quarries, no injury be done to the said navigation; anything herein contained to the contrary notwithstanding.

4. In pursuance of the Act the Dudley Canal was constructed by the company and maintained by them.

5. By another local Act, 25 Geo. 3, c. 87, (herein called "The Dudley Canal Extension Act)," powers were given to the company to extend their canal. By another local Act, 33 Geo. 3, c. 121, power was given to the company to make and maintain a canal from the Dudley Canal at Netherton to the Worcester and Birmingham Canal, and this Act incorporated the former Acts.

6. In pursuance of the last-mentioned Act, a canal called the "Netherton Canal," was constructed by the company.

7. By 5 Wm. 4, c. xxxiv (called the Birmingham Canal Consolidation Act), certain persons were incorporated as a company by the name of "The Company of Proprietors of the Birmingham Canal Navigations."

By s. 4, certain canals already made were vested in such company, and by s. 16 powers were given to the company to make certain new canals; and by s. 93 it was enacted that no proprietor of mines should on any account whatever work any mine within twelve yards of the said then existing or future canals, towing-paths, reservoirs, or other works belonging to the company, except as thereinafter mentioned, and except for the purpose of making gateways, headways, or tunnels of limited dimensions, without the consent of the company; and (s. 95) if the proprietor of mines under the said canal should be desirous of working the [249 same, he should give one month's notice in writing under his hand of such intention to the company, who might thereupon, if they considered the working of such mines would be prejudicial to the canal, purchase the same; and the company might inspect such mines, and if they did not within one calendar month of such notice treat with the proprietor for the purchase of such mines, the proprietor might work them without being liable to the company for any damage which might be done thereby, unless such damage be willfully done or be caused by the working of such mine in an improper manner.

8. By 9 & 10 Vict. c. ccxcvi, The Birmingham and Dudley Canals Consolidation Act, 1846, the Company of Proprietors of the Dudley Canal Navigation was incorporated with and merged in the defendant's company, and the canals and lands of the Dudley Canal Navigation were vested in the defendants.

9. The said several Acts of Parliament may be referred to on the argument of this case.

10. Until 1846 the Company of Proprietors of the Dudley Canal Navigation maintained and managed the Dudley and Netherton Canals, in conformity with the several Acts of Parliament herein referred to from time to time in force, and since that year to the present time, and at the time when the causes of complaint in this action are alleged to have arisen, the defendants maintained and managed the same, and kept them supplied with water.

11 and 12. There were under part of the Netherton Canal extending to some distance on both sides of the Canal, two seams of coal lying near to each other. These seams were called the "Brooch Coal."

13. Lord Dudley was the owner of the mines, and under him the plaintiffs, as his tenants, acquired the right to work and get the said seams of coal, and had entered upon and were in possession of the mine and working it.

14 and 15. On the 14th of January, 1868, the plaintiffs caused the defendants to be served with a notice, that they were desirous of working, and intended after the expiration of three months from the date of this notice to work and get, in accordance with the provisions of the Acts of Parliament relating thereto, the mine of Brooch coal which lies under and within the distance of twelve yards on either side of a certain part of the defendants' canal [describing it], and that if within thirty 250] days the company should *wish to inspect the said Brooch coal proper facilities should be afforded to the person appointed for that purpose.

16. The defendants did not inspect the mines, and they refused to purchase.

17. In April, 1868, the defendants began to repair the canal where it passed over the plaintiffs' mines, and for some distance beyond them both ways; that is to say, the part thereof included between the two dams hereinafter mentioned, and early in May the repairs were completed, and it was then in good order and condition, and its bed at and beyond the place where the plaintiffs' coal was to be worked was on that occasion properly puddled, and was watertight and would have so remained it it had

been undisturbed by the working of the mines by the plaintiffs as after-mentioned.

18. In the course of the plaintiffs' workings they reached the coal lying near to and under the canal about the beginning of September, and proceeded to work out the same. The effect of the mine being got out, as the workings approached and were carried under the canal, was that the strata near to and above the void so created and the surface and the canal and the bed thereof sunk and were cracked, broken, and dislocated, and water from the canal escaped through the cracks and breaches so caused and passed through the dislocations in the strata into the plaintiffs' workings and flooded the workings in parts thereof, so that the plaintiffs were unable to get the coal so flooded, and were obliged to abandon and lost the same, and they also lost the benefit of certain gate-roads which they had been at the expense of making in order to work the coal so flooded; and it also caused an increase of the expense of getting the coal from parts of the working where it was gotten, and some of the coal was deteriorated in value from being saturated with the water.

19. While the plaintiff's workings were proceeding, the defendants, for the protection of the canal as well as to keep its bed watertight if possible, had everything ready to repair it and to raise its banks and to fill up its bed when they should sink; and when they did sink the defendants did in fact repair and raise the banks and fill up the bed of the canal so as to restore it to its former depth (the raising of the banks after the sinking having *made the canal deeper), and this was done in a proper [251 and careful manner, and with proper material calculated to fill up cracks if any should occur; but where the bed of a canal has been or is in the course of being broken by mining there are no certain means of keeping the canal watertight.

20. When the canal was repaired and its bed repuddled the water was taken out and kept out during the repair. This was effected by means of two dams 150 yards apart, and by cutting a trench in the side of the canal between those dams through which the water was let into an adjoining watercourse, and the position of the plaintiffs' mines was between the two dams. One of these dams was at a bridge called "Accommodation Bridge," and was formed by letting planks into grooves fixed to each side of the bridge, and backing them up with clay; and the other dam,

which was at a wider part of the canal, was formed by driving piles into the bed of the canal in a line across and backing them up with clay as at the other dam; and when the repair was completed in the beginning of May, as before mentioned, the bank of the canal where the trench had been cut being also restored and repaired, the dam at Accommodation Bridge was removed, and the water let into the canal; But at the other dam the piles were allowed to remain and they prevented any through traffic on the canal, as boats could not pass them; and some time afterwards when the canal had been considerably shaken and affected by the plaintiffs' workings the planks were again put into the grooves at the bridge, but were lifted out and removed on several occasions to admit boats which were not going beyond the piles. The piles were left by the defendants as a matter of precaution for the protection of the canal, in case the plaintiffs' workings should so affect it as to render it necessary to let the water out from between the dams; so that the dams might in that case be restored without loss of time, and so that the water from the whole pound of the canal should not escape, and it was a proper precaution.

21. Some time after the plaintiffs had worked under and across the canal, and thereby broken the strata, and lowered the surface as before mentioned, and after the water had got into the mines and had done part of the damage which the plaintiffs complain of, and while such damage was still continuing, 252] namely, in the beginning *of October, the plaintiffs met the engineer and clerk of the company at the colliery, they having come there in consequence of the plaintiffs' complaints of the water escaping into their mines, and in the course of conversation proposed to them that the defendants should let the water out of the canal and keep it empty for three months, promising that by that time they would work out the coal which could be affected by the water. This request was not complied with; but the piles were allowed to remain in the canal impeding the navigation to the extent hereinbefore appearing for a period of more than three months after the above request was made. But the defendants were guilty of no actual carelessness in management of their canal, unless it were carelessness to allow the water to be in it while the mines were worked.

22. The plaintiffs worked their mines without regard to the

surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably dislocate the strata, and that there was danger of the water from from the canal escaping into their mines; but, if they were right in thus acting, they did not work their mines in any negligent or unskillful or improper manner, but got the coal in the manner in which the Brooch coal is ordinarily gotten, and without doing so they could not have obtained the full benefit of their coal.

23. The Court may draw such inferences of fact as in their opinion the jury ought to have drawn.

The question for the opinion of the Court is, whether the defendants are liable to the plaintiffs for the damage sustained by them as aforesaid, and how the findings on the respective issues are to be entered. (1)

1871. Nov. 10. *Huddleston*, *Q.C.* (*J. O. Griffits* with him), for the plaintiffs.

H. Matthews, *Q.C.* (*Macnamara* with him), for the defendants.

The arguments are fully given in the judgments, and it is unnecessary to repeat them; in addition to the cases noticed in the judgments, the following cases were cited — for the plaintiffs: * *Wyrley Canal Co.* v. *Bradley* (2); *London and North Western* [253 *Ry. Co.* v. *Ackroyd* (3); for the defendants: *Whitehouse* v. *Birmingham Canal Co.* (4); *Smith* v. *Kenrick.* (5)

Cur. adv. vult.

Jan. 31. The following judgments were delivered:—

COCKBURN, C.J. This is a case of considerable importance, as affecting the relative rights and liabilities of canal and other companies, being owners of the surface of land, and of the owners of minerals lying below the surface.

The defendants are a canal company, proprietors of a canal called the Netherton Canal. The plaintiffs are the proprietors of a mine lying below a part of the bed of the canal. The action, upon which this case has been stated, is brought to recover

(1) There were other issues as to the sufficiency of the plaintiffs' notice which were abandoned on argument, and the facts as to them are therefore omitted.

(2) 7 East, 368.

(3) 31 L. J. (Ch.), 588.

(4) 27 L. J. (Ex.), 25.

(5) 7 C. B. 515; 18 L. J. (C.P.), 172.

damages for alleged negligence in the management of the canal by the defendants, by reason of which the water of the canal escaped into the plaintiff's mine, flooded it, and prevented its working, and caused considerable damage to the works.

The defendants, besides a plea of not guilty, pleaded, except as to the charge of negligence and improper conduct, that the water was brought into the said canal in pursuance of certain Acts of Parliament authorizing the construction and maintenance of the canal; that the mines were not worked till after the completion of the same; and that the alleged injury to the plaintiffs' mines happened without any negligence or default on their, the defendants', part.

The company was formed, and the canal in question constructed under an Act of the 33 Geo. 3, in which the provisions of a prior Act, the 16 Geo. 3, c. 66, called the Dudley Canal Act, were incorporated.

By the latter Act the canal company were authorized to enter upon, set out, and take the land necessary for making the canal, and to construct the latter, "doing as little damage as might be". in the execution of the powers granted to them. In the event of the owners of the land so set out and the company not being able to agree as to the purchase-money to be paid for the land, 254] the *amount was to be settled by commissioners appointed by the Act; or, if required by either of the parties, was to be assessed by a jury.

By the Act (1) the company are authorized to do all matters and things which they shall think necessary and convenient for making, preserving, completing, and using the navigation, they and their successors making satisfaction, in manner thereinafter mentioned, for all damages to be sustained by the owners or proprietors of such lands, &c., as shall be taken, used or prejudiced in or by the execution of all or any of the powers of the Act; and the Act is to be a sufficient indemnity for what they shall do by virtue of the powers thereby granted.

Provision is made for securing compensation for damage caused to adjoining owners by the execution of the works which the company are authorized to construct and carry on.

The commissioners (2) are not only to determine what shall be paid for the purchase of the lands required for making the

(1) Page 1592. (2) Page 1603.

canal, but also "to determine and adjust what other distinct sum or sums of money shall be paid as a recompense for any damage which may or shall be at *any time or times whatsoever* sustained by the owners of any lands, &c., for or by reason of making, repairing, or *maintaining the said canal*, or by the *flowing, leaking, or oozing* of the water over or through the banks of the canal;" but (1) they are not to be "obliged to take notice of any complaint for injury or damage sustained, unless application has been made to the company or their agents, &c., within six months next after the time when such injury or damage shall have been sustained, or the doing or committing thereof shall have ceased."

All that was required by the company for the formation of the canal being the surface of the land, the right (2) to the mineral below it was expressly reserved to the owners of the land, subject to certain conditions and restrictions in respect of the working of it, presently to be referred to, and to a proviso that in working mines or quarries "no injury should be done to the navigation." These conditions and restrictions, imposed, evidently for the protection of the company, on the exercise of the right to the subjacent mineral *thus reserved to the land- [255 owner, are, in effect, such as to give an option to the company to prevent the working of the mineral altogether on making compensation to the owner.

The substance of the provisions thus regulating the respective rights of the parties in regard to the mineral is as follows. In the first place, it is provided (3) that no mineowner shall dig or carry on any work for mining under or within twenty yards of any tunnel, without the consent of the company. No mineowner is to dig or carry on any work for getting coal or other mineral within twelve yards of the canal or of any reservoir of the company; nor is any coal or other mineral to be got under any part of the canal, or the towing paths or reservoirs, or under any ground lying within twelve yards of either side of any of them, without the consent of the company given under their common seal.

While, however, protection was thus given to the company against the working of mines which might be dangerous to the safety of the canal, it was not intended that the owners of the

(1) Page 1608. (2) Page 1657. (3) Pages 1640–41.

mineral should be left at the company's mercy. In order, therefore, to enable a mineowner, when desirous of working the mineral, to obtain the consent required, or compensation for the loss of the mineral, it is provided (1) that if a mineowner is desirous of working a mine lying under the canal, &c., or within the prescribed distance, he shall give three months' notice to the company. Thereupon, the latter are to be at liberty to inspect the mine "in order to determine what coal or other minerals may be come at and actually gotten without prejudice or damage to the said canal, &c." If upon such inspection the company refuse to permit the mineowner to work the part so lying below the canal, &c., or within the prescribed distance, or in any other manner obstruct or prevent him from getting the same, then the company are, within three calendar months afterwards, to pay to the mineowner "such price as the next adjoining mines of equal quality shall have been really and bonâ fide sold for, or be estimated or valued at;" and in the event of any dispute arising touching any of these matters, the same is to be settled by the commissioners, subject, if required, to the verdict of a jury.

In the possible case, still remaining, of the company omit-
256] ting to *inspect the mine, and thereupon to give their consent to the working of the mineral, or, by their refusal, to place the mineowner in a position to obtain compensation, such a state of things is provided for by the enactment that, if the company fail or neglect to inspect within thirty days from the notice of the mineowner, it shall be lawful for him to work such part of the mine and get the mineral.

The purport and intent of the foregoing legislation is plain. It was intended, in the first place, to relieve the company from the necessity of including in the amount, to be paid for the land in the first instance, the value of the mineral not situate in the upper portion of the soil required for their works; and such mineral was reserved to the landowner.

Further, it was intended to protect the company against mining operations which might prove fatal or injurious to their works above, by enabling them to step in and prevent such operations, on making compensation to the owner; but inasmuch as such mineral might never be gotten by the owner, to whom it was

(1) Pages 1642–43.

thus reserved, or, at all events, not till a future period, and as in point of justice it would be quite time enough to pay him for it when the period came at which he really desired to get it, and would have proceeded to get it but for the powers of the company, it was intended to relieve the company from the necessity of making such compensation till that period arrived, if it should then be found expedient by the company to prevent the exercise of the right to the mineral. On the other hand, it is equally clear that it was intended to preserve to the mineowner the right either to get the mineral or to be paid an indemnity for the loss of it, at the option of the company.

This being so, it was held in the case of *Dudley Canal Company* v. *Grazebrook* (1) which was a case arising upon this same Act of Parliament, that where the canal company refused to inspect a mine, and thereupon to elect to give or refuse their consent to the working of it, the right to work it in such case being expressly reserved to the mineowner, if damage to the works of the company should result from the operations below, no action could be maintained *by the company, provided those [257 operations had been carried on with proper care and in the ordinary course of mining.

But it is obviously a very different thing to say that, where the mineowner has by his own operations injured the bed of the canal, and so let the water into his mine, he can in an action at law recover damages against the proprietors of the canal. This is the question which we have now to decide.

In the present case, the plaintiffs, the mineowners, gave due notice to the defendants of their desire to work the part of their mine lying within twelve yards of either side of a part of the canal, and invited the company to make inspection of the mine. The company did not inspect the mine, and refused to purchase the mineral; whereupon the plaintiffs, after the expiration of the thirty days, proceeded to work the mine. In consequence of such working, and from no other cause, cracks and fissures were produced in the bed of the canal, through which the water found its way into the mine below, and flooded it, whereby the plaintiffs were unable to get their coal and sustained other damage.

It is expressly stated in the case that, shortly prior to the

(1) 1 B. & Ad., 59.

commencement of the plaintiffs' operations, the defendants had repaired the bed of the canal lying above the plaintiffs' mine; and that the bed was, at and beyond the place where the plaintiffs' coal was to be worked, properly puddled and watertight, and would have so remained if it had not been disturbed by the working of the mines below by the plaintiffs.

It is further found, that, while the plaintiffs' workings were proceeding, the defendants, for the protection of the canal, as well as to keep its bed watertight, if possible, had everything ready to repair it, and to raise its banks, and to fill up its bed, when these should sink; and that when they did sink, they did in fact repair and raise the banks, and fill up the bed of the canal, so as to restore it to its former depth (the raising of the banks after the sinking having made the canal deeper); and that this was done in a proper and careful manner, and with proper material, calculated to fill up cracks if any should occur; but that where the bed of a canal has been, or is in the course of being broken by mining, there are no certain means of keeping the canal watertight.

It must, therefore, be taken as an admitted fact, that there 258] was *no negligence on the part of the defendants contributing to the damage occasioned to the mine, unless, indeed, the omission to empty the water out of the canal above the plaintiffs' mine, while the mine was being worked, can be so considered. But I cannot think that it was at all incumbent on the company to interrupt the navigation, which it was their business to keep open for the accommodation of the public, in order to afford the plaintiffs the opportunity of getting their coal.

To the facts before stated must be added the, to my mind, all-important, statement contained in the case, that the plaintiffs worked their mines without regard to the surface, and without attempting to support it, and with knowledge that the effect would be to let down the surface, and probably to dislocate the strata, and that there was danger of the water from the canal escaping into their mines; "although," it is added, "if they were right in thus acting, they did not work their mines in any negligent or unskillful, or improper manner, but got the coal in the manner in which the coal there is ordinarily got." It

must be taken also that without doing this they could not have obtained the full benefit of their coal.

Upon this state of facts, it seems to me that this action, which is founded on the alleged negligence of the defendants in the management of the canal, cannot, at all events in its present form, — all negligence in such management being expressly negatived, — be maintained. But as the declaration might possibly be amended, so as to be adapted to the actual facts of the case, I proceed to consider how far an action at law, in whatever form the declaration may be framed, can, under the circumstances stated, be held to lie against the defendants for the damage occasioned to the mine, — this being, as I apprehend, the question submitted for our decision. It appears to me that, not only is there no authority for saying that such an action will lie, but also that in principle we ought to hold that it will not.

The case of *Fletcher* v. *Rylands* (1) in the Exchequer Chamber, and in which the judgment of that Court was afterwards affirmed in the House of Lords (2), was indeed relied on by the plaintiffs' counsel in argument as a conclusive authority in their favor. *And, if the decision in that case were applicable to the [259 facts of the present, I should of course bow to its authority. But it appears to me to be plainly distinguishable in two most important particulars. The Court of Exchequer Chamber held that, if a person accumulate on his land, by artificial means, a quantity of water, which, if allowed to escape on to his neighbor's land, will be productive of injury, he is bound to keep it in at his peril. In that case the plaintiff, the owner of a mine, was working it in the ordinary course. The defendant constructed on his own land a reservoir, for the purpose of working a mill, and accumulated a large quantity of water therein. Unfortunately under the ground, on which the reservoir was made, a mine had formerly been worked, and the effect of the old workings having been to weaken the soil above, when a certain quantity of water had been collected in the reservoir, the ground below gave way; and let the water down into the old workings; and as the latter communicated under ground with the plaintiff's works, — a fact unknown both to plaintiff and defendant, — the water flowed into the works and flooded them. It is true that, in that

(1) Law Rep., 1 Ex., 265. (2) Law Rep., 3 H. L., 330.

case, there was the additional circumstance that the persons employed by the defendant to make the reservoir had been guilty of negligence in not taking measures, when they discovered the indicia of the old workings, to ascertain whether the ground would bear the weight of the water about to be placed upon it, or whether the old workings might communicate with the plaintiff's mine. But the decision did not proceed on this ground. In the judgment of the Exchequer Chamber, as delivered by Blackburn, J. (1), and which was fully affirmed and adopted by the House of Lords, the ground of the decision was the broad position that he who brings on to his own land something which was not on it before, and which if it gets on to his neighbor's land may be productive of mischief, must at his peril keep it from getting to his neighbor's land; and, though he may use the utmost care and diligence to do so, will still be liable for injury done if he fails. I cannot, therefore, think that, if *Fletcher* v. *Rylands* (2) were otherwise applicable to the present case, the defendants could avail themselves of the admitted fact of the absence of all negligence on their part in the management of the canal.

260] *But there is more than one obvious and striking distinction between the case of *Fletcher* v. *Rylands* (1) and the present. In the former case the mineowner was working his mine before the defendant began to construct his reservoir. He neither knew, nor had reason to suppose, that the reservoir was being placed over old workings, or that these old workings communicated under ground with his mine. There was no negligence or willful incurring of danger on his part. In the present case, the plaintiffs saw the danger, and may be said to have courted it. They had good reason to believe that, if they proceeded to work their mine under the canal, they would bring down the water upon their works. In all probability they set to work on the calculation that, if that result should follow, as it probably would, they should get the value of the coal by bringing an action against the company. In this most important particular, this case appears to me to differ essentially from that of *Fletcher* v. *Rylands* (1), and not to be within the principle involved in the judgment in that case.

There is also this further most material distinction between

(1) Law Rep. 1 Ex., at p. 279. (2) Law Rep. 3 H. L., 330.

the case of *Fletcher* v. *Rylands* (1) and the present. In the former the defendant in making his reservoir was subject to the common law limitation of the right of property, namely, that a man in using his own must take care not to injure another. In the present case the company were acting under statutory powers, which expressly authorized them to make and maintain the canal and navigation, subject only to making compensation if damage should at any time arise from the exercise of their powers.

These distinguishing features of the present case, while they exclude the application of the decision in *Fletcher* v. *Rylands* (1), also make it impossible, on principle, that such an action as the present can be maintained.

In the first place I cannot think that, where an injury results to a man, not from the danger alone to which the act of another has exposed him, but from his own willful and intentional exposure to such danger, as its proximate and immediate cause, he, who has thus brought the injury on himself, can maintain an action in respect of it. If A. does an act which exposes B. to danger, and *without any concurrence on the part of B., [261 injury arises therefrom to the latter, he has of course a right of action against A. But if B., knowing the danger, willfully exposes himself to it, he has himself brought, or at all events, contributed to bring the injury on himself, and cannot visit A. with the consequences of what, but for his own act, might never have resulted in injury at all. If A. illegally creates an obstruction in a public highway, and B., not knowing of its existence, drives against it, and damage ensues, B. has a right of action. But if B, knowing it to be there, were intentionally to drive against it for the purpose of knocking it down, and by doing so occasioned damage to himself, he would be without remedy; more especially, if at the time he did so he calculated on bringing an action for damages in the event of his sustaining injury. Analogous examples might be multiplied, but one is sufficient to illustrate the principle for which I am contending, namely, that no action at law can be maintained for an injury which has been brought about by the willful and intentional act of the party complaining, as its proximate and immediate cause, such act having been done by him with his eyes open, in other words, with a knowledge that the

(1) Law Rep. 3 H. L., 330.

injury would be the probable consequence of the act so done by him.

Again, the act on the part of the defendants, on which the plaintiffs rely as having caused the damage of which they complain (assuming even that they have a right to ascribe that damage to the conduct of the company, instead of to their own acts), being that of keeping water in the canal, and this having been made lawful in the company by the statute, it is impossible to say that what is thus expressly legalized can be made the ground of an action of tort.

The argument that the present action will lie appears to me to be founded on an imperfect appreciation of the real ground in respect of which the plaintiffs can have any well-founded cause of complaint. The wrong, if any, done to the plaintiffs was not that the canal company caused damage to the mine by negligence in managing the canal; for such negligence is expressly negatived: nor was it that they kept the water in the canal while the plaintiffs were carrying on their works below: for, in keeping the water in the canal for the purpose of the 262] navigation, the defendants were *only acting in conformity with their statutory powers and their duty to the public. The only wrong that can be said to have been really done to the plaintiffs was that, while it was impossible for them to get their coal without bringing on themselves the disaster which has in fact ensued, the defendants omitted to inspect the mine, and so to ascertain the true state of things, and thereupon to fulfill the obligation which the Act of Parliament evidently contemplated their taking upon themselves, though it might be only for their own protection,—namely, that of paying the value of the mineral and thus compensating the plaintiffs for the loss of it.

But though, morally speaking, the defendants may have acted unjustly in not purchasing the coal of the plaintiffs, under the circumstances in which the latter were placed, I cannot think that they were under any legal obligation to do so. The Act does not make it obligatory on them to inspect the mine proposed to be worked, or to exercise their power of preventing the owner from working it. Their powers in those respects are conferred for their own protection; and may be exercised, or not, at their option. If they do not think proper to exercise them, they may, if they please, leave the mineowner to exercise

his right of property over the mineral, and to work his mine, or not, as he may be advised.

What, then, is the position of the mineowner under such circumstances, if the mine cannot be worked without imminent danger to the canal above and to the mine itself below? It does not lie in the mouth of the canal company to say that he should proceed to get his coal, when, by the hypothesis, he may do serious damage to the navigation, which by the express terms of the Act he is prohibited from doing. He cannot be reasonably expected as a prudent man to incur the danger of destroying his own works, when, if the view I take of this case is right, if he did so he would be precluded from bringing an action against the company, as having by his own act occasioned the damage. Is he then reduced to the alternative of foregoing the advantage of getting his mineral without remedy against the canal company, whose works have placed him in this position? I think certainly not. It appears to me clear that a mineowner thus circumstanced would be entitled to compensation under the clause providing for compensation *for damage occasioned by the execution of the com- [263 pany's works. That clause is general in its terms. It is not confined to damage caused by the company's works at the time of their execution, but extends to damage whensoever it arises as the necessary result of such works. If, on the one hand, the company obtain the advantage, as they do, of having the compensation for mining interests interfered with postponed till the mines are actually worked, they cannot be heard to say that the damage to the mineowner from inability to work a mine by reason of their works is one which should have been claimed for and assessed at the time the land was taken. When the mineowner, who would otherwise work his mine, finds himself prevented from doing so by reason of the defendants' works above him, except at a risk which no prudent man could reasonably be expected to incur, — a state of things which practically amounts to an absolute inability to work his mine, — he, in my opinion, sustains damage for which he is entitled to compensation. I think, therefore, that when the plaintiffs found themselves unable, owing to the immediate proximity of the canal, and the danger arising from it, to work their mine, except at the risk of its almost certain destruction, this inability

constituted damage for which they were entitled to compensation under the statute, and for which they might have sought and obtained compensation, in the manner prescribed, through the commissioners, who are, or may be, perpetuated under the Acts. Whether the plaintiffs, by adopting the course of attempting to work their coal, instead of asking for compensation for the loss of it, whereby they occasioned the flooding of the mine, or by reason of the lapse of time, have precluded themselves from still having recourse to the statutory remedy, it is unnecessary now to determine. I am, indeed, disposed to think that they would still be entitled to compensation for the loss of the coal, which, owing to the making of the canal they never could have got; while as regards any mischief to their works beyond the loss of the coal, occasioned by the flooding of the mine, and in respect of which damages could only be recovered in an action of tort, they would be unable to recover, such damage having been the consequence of their own acts. It is however unnecessary to come to any decision on these matters, or to de-
264] termine whether *the plaintiffs have, or might have had, any or what remedy under the statute; and I have only thought it desirable to work out this part of the question in order to show that the inability to get the coal, as arising from the existence of the canal, was damage under the Act, for which compensation might have been obtained under it, and cannot therefore form a ground for an action of tort against the defendants.

The special case before us being stated on an action of tort, all we have to consider is, whether, in whatsoever form, an action of tort will lie against the defendants on the facts stated. But, there having been nothing in the conduct of the defendants, either as to anything done or anything left undone, which was of a wrongful character, or otherwise than arising in the due execution of their statutory powers, I am of opinion that no such action can be maintained against them, and that, consequently, our judgment should be in their favor.

My Brother Lush concurs in this judgment.

Mellor, J. [after stating the pleadings, and the effect of the preamble of 16 Geo. 3, c. 66, and of the clauses set out in parr. 2 & 3, and the facts in parr. 14, 16, 17–19, and 22.] In this

state of facts, the plaintiffs seek to recover damages from the defendants for the loss of that portion of their coal, which the flooding of the mines by the water which escaped out of the canal prevented their getting.

It is to be observed, that no negligence in point of fact is imputed to the defendants; but, on the contrary, it is clear that the canal was kept and maintained in proper order and condition, that is, well puddled and watertight. And this raises the question, whether, under the provisions of the Acts of Parliament which regulate the relation of the parties to each other, the defendants can be made liable in an action, *without negligence in fact*, for loss accruing to the owners of the mine by reason of the flooding thereof occasioned by their own act without some act or default done or suffered by the defendants. I am of opinion that they cannot.

In the case of *Dudley Canal Company* v. *Grazebrook* (1) the provisions *of 16 Geo. 3, c. 66, came under the consideration [265 of this Court, in an action the converse of the present, wherein the company sought to recover damages against an owner of coal mines, for working his mine, after notice and refusal by the company to purchase, whereby injury had accrued to the navigation. In that case the mineowner had been guilty of no negligence in the working of his mine, and it was sought to make him liable under the words of the proviso [p. 1657], "that in working such mines and quarries no injury be done to the said navigation, anything herein contained to the contrary notwithstanding." The Court, in that case, put a limit on the generality of the words in the proviso, and Bayley, J., in delivering the judgment, said: "If this proviso is to be construed literally, it is inconsistent with the 62d section [pp. 1642–3] for if the owner in working mines is to be responsible *at all events* for any injury or damage only (2) to the canal, would the company ever purchase the minerals from such owner?" And accordingly the language of the proviso was interpreted to mean "either that the party working the mines is to do no unnecessary damage or injury to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode." (3) That construction of the proviso was

(1) 1 B. & Ad., 59. (2) Sic, quære "done." (3) 1 B. & Ad., at p. 74.

afterwards affirmed in *Stourbridge Navigation* v. *Earl of Dudley* (1), in which a case, arising under a canal Act containing similar provisions, came under the consideration of a Court of error, and there is no doubt that it must now be considered as settled by those cases, that under circumstances such as exist in the present case, no action would lie by the defendants against the plaintiffs. Indeed, Martin, B., quoted, during the argument in the latter case, from the judgment delivered by Bayley, J., in the former case: "It is not necessary to give an opinion whether the defendants could have got their minerals in any manner that they pleased without being liable to an action. The point for our decision is, whether they are responsible for the damage done to the plaintiffs by working their own mines in the ordinary and usual mode." (2) This construction was actually adopted in a subsequent Act, 5 Wm. 4, c. xxxiv, which
266] *is one of the Acts the powers of which are now vested in the defendants, and under which certain canals now vested in the defendants were constructed.

No suggestion is to be found in those cases which can support the proposition now contended for, viz., that the mine-owner might possibly maintain an action against the canal company, in case of damage resulting from water escaping from the canal into the mines, caused solely by the owner's own act.

The case of *Fletcher* v. *Great Western Ry. Co.* (3) was also cited by the plaintiff's counsel; but that case is peculiar in its circumstances, and is certainly no authority for the plaintiffs' contention, and carries it no further than do the cases before cited. It was an action to recover compensation which had been assessed under the Lands Clauses Consolidation Act, in proceedings which had been occasioned by a notice from the railway company to the mine owners; and the only way in which it bears on the present case is that the railway company, having purchased the surface of certain lands for the purpose of constructing their railway, and having taken a conveyance in the form prescribed by that statute, were held not entitled to support from the subjacent minerals, so as to prevent the mine-owner from getting the same as might have been done under a voluntary conveyance at common law; and Martin, B., in his

(1) 3 E. & E. 409; 30 L. J. (Q.B.), 108. (2) 1 B. & Ad. at p. 98.
(3) 4 H. & N., 242; 28 L. J. (Ex.), 147; in error, 5 H. & N. 689; 29 L. J. (Ex.), 253.

judgment thus described the relation of the parties: "The owner is to be at liberty to go on working the mines in a proper and careful manner, due and proper care being taken to prevent injury to the railway." This case was followed by *Great Western Ry. Co.* v. *Bennett* (1), which was virtually brought to reverse the judgment of the Court of Exchequer and the Court of Exchequer Chamber in the above mentioned case of *Fletcher* v. *Great Western Ry. Co.* (2), but which conclusively established the propriety of these decisions, and the right of the mineowner to recover the compensation for his minerals, which had been assessed under the 78th section of the Railway Clauses Consolidation Act. The main reliance of the plaintiffs in support of their right to maintain this action was, however, placed upon the cases of *Bagnall* v. *London* *[267] *and North Western Ry. Co.* (3), *Barber* v. *Nottingham and Grantham Ry. Co.* (4), and *Fletcher* v. *Rylands.* (5) If the circumstances of the present case bring it within the authority of those cases, then, of course, we are concluded by authority, and our judgment must be for the plaintiffs.

In *Bagnall* v. *London and North Western Ry. Co.* (3) the defendants had, under parliamentary powers, constructed a railway and carried it over the plaintiffs' mines in a cutting. The original soil was clay, and was impervious to water; but the removal of the clay in the making of the cutting exposed a pervious stratum subject to cracks and fissures. In consequence of the cutting, water from a brook crossed by the railway, in flood time, flowed along the cutting over the plaintiff's mines, and the side drains being insufficient to carry it off, the water flowed over the pervious surface, and so escaped into and flooded the plaintiffs' mines. The rain-water descending upon the railway and the sides of the cutting was in like manner carried along the railway, and over and into the mines. Under these circumstances it was held that the defendants were liable in an action for the damage. In delivering the judgment of the Court of Exchequer (6), Bramwell, B., describes the injury as follows:

(1) Law Rep. 2 H. L., 27.

(2) 4 H. & N. 242; 28 L. J. (Ex.), 147; in error, 5 H. & N. 689; 29 L. J. (Ex.), 253.

(3) 7 H. & N., 423; 31 L. J. (Ex.), 121; in error, 1 H. & C., 544; 31 L. J. (Ex.), 480.

(4) 15 C. B. (N.S.), 726; 33 L. J. (C.P.), 193.

(5) Law Rep., 1 Ex., 265; Law Rep. 3 H. L., 330.

(6) 7 H. & N., at p. 448; 31 L. J. (Ex.), at p. 129.

"The railway company cut and removed upwards of twenty feet in thickness of the surface. . . . This surface soil was dry and impervious to water. By removing it a porous rock was reached. The soil was in like manner cut away along the line to a district of country through which a brook flowed. Here the railway was on or above the natural level of the ground; it was carried over the brook by a flat bridge. The line of railway sloped downwards from the bridge to a part over the plaintiff's mines. The bridge was sufficient to let the ordinary water of the brook pass, but was found an impediment to the passage of water in large floods. The railway company was bound to make and maintain drains, the obligation being the same as in the Lands Clauses Consolidation Act. A flood happened in 1860, and *the result of the combined acts of the company* was, that water, which 268] *would have escaped but for the bridge, flowed down the railway, and the high ground between the brook and the surface over the mine being removed, it reached that spot, and the high ground and the protection of the clay then being gone, and the drains being imperfect, it penetrated into the mine. So also did the water falling on the spot itself, and the springs arising in the cutting." After referring to the working of the mines he proceeds: "The plaintiffs worked on, and when their workings came under the railway, from no fault or negligence of theirs, but as a natural consequence of fair and lawful working, the railway sunk and continued to do so from time to time. The defendants repaired this by throwing materials of a porous character on the sunk parts; they did not, however, repair and puddle the drains, which, from the sinking of the soil, became inefficient, and even had they been efficient, they would not have carried off the flood-water of 1860." He concludes the judgment as follows: "It is not, therefore, the works intrinsically which injuriously affect the plaintiffs, but the defendants' wrong conduct in relation to them, in not making and maintaining outlets for the flood-water, or draining it off the plaintiff's land, or covering the surface thereof with clay, and in not maintaining those drains which were efficient to carry off the rain which fell, and the spring water which arose there."

I cite this judgment at such length to show the grounds on which it was based; for, whilst Bramwell, B., affirms most distinctly the right of the plaintiffs to work the mines as they did,

it is clear that the foundation of the judgment is, that acts or defaults were done or committed, or that acts were neglected to be done by the company; and that they had not fulfilled the obligations imposed upon them by their local Act, and the clauses as to drains to be found in the Railway Clauses Consolidation Act incorporated therewith.

When the case came before the Court of Exchequer Chamber, the judgment was affirmed, and Willes, J., who delivered the judgment of that Court, thus states the grounds upon which the Court of Exchequer Chamber proceeded (1): "In this case the conjoint effect of the making of the defendants' cutting, and of their neglect to keep their drains in proper order, has been that large *quantities of water, which but for the [269 cutting would not have come into the plaintiff's mine, and but for the defective state of the drain would have passed away and been carried off without injury to the mine, poured down into and damaged the mine, for which damage the present action is brought. It appears, therefore, that the judgment in each court was based upon some supposed act, omission, or default, on the part of the company, amounting to negligence in fact.

The case of *Barber* v. *Nottingham and Grantham Ry. Co.* (2), was also relied upon by the plaintiff's counsel. That was an action brought to recover from the defendants a sum of money assessed by a jury as compensation, to which the plaintiffs were entitled, for injury to their lands and mines by water escaping from a reservoir; and one of the questions, and the only one which is material to the present, arose on a demurrer to the fourth plea, which stated, that the alleged damages were caused by the flowing, leaking, and oozing of the water of the reservoir through the banks thereof, and not in any other manner whatsoever, except as aforesaid, by the making or maintaining of the said reservoir, or by reason of the execution by the defendants of the powers of their Act; . . . and that it was caused by the acts of the plaintiffs themselves in sinking shafts and pits on their lands and coal mines, and in causing large quantities of water, which naturally lay and were contained in the underground soil or strata in which the said shafts or pits were sunk, and which were situate between the said shafts and pits and the

(1) 1 H. & C., at p. 545: 31 L. J. (Ex.), at p. 481.
(2) 15 C. B., (N.S.), 726; 33 L. J. (C.P.), 193.

said reservoir, and formed the banks and support thereof, to flow, leak, and ooze, without the defendants' default or knowledge, through the banks, and to percolate into the said pits and mines.

No doubt can be entertained that, if a company be authorized to construct a reservoir, they must make it in such a way and of such materials as will prevent a leakage and oozing through the banks thereof, to the damage of adjoining owners. It is hardly necessary to say more than that the decision proceeded on grounds entirely distinct from those of the present case, and that the plea really admitted facts which amounted to actual negligence.

But the case of *Fletcher* v. *Rylands* (1), in the Exchequer Cham-
270] *ber, was principally relied upon, and no doubt that case, affirmed as it was in the House of Lords (2), is of the highest authority, and concludes every case which comes within the principle of it. The parties there were not under the provisions of any Act of Parliament, but were acting upon their rights, and were subject to the obligations imposed upon them by the common law. In that case the defendants, for the purpose of a mill belonging to them, constructed a reservoir upon their own ground, the coal under which had at some remote period been worked out; but this was unknown at the time when the defendants gave directions to construct the reservoir; and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the subsoil. The defendants selected competent engineers and contractors for the work, and were themselves in total ignorance of such latent defect, but the persons so employed by the defendants, in the course of the working, became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It was found, in that case, that the defendants personally were free from all blame, but that in fact proper care and skill were not used by the persons employed by them to provide for the sufficiency of the reservoir to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings,

(1) Law Rep., 1 Ex., 265. (2) Law Rep., 3 H. L., 330.

and thence into the plaintiff's mine, and there did the mischief. The rule of law applicable to such a state of facts is thus expressed by Blackburn, J., in delivering the judgment of the Court of Exchequer Chamber (1), and is quoted and approved by the Lord Chancellor (Lord Cairns), when the case came before the House of Lords (2): "We think that the true rule of law is, that the person, who for his own purposes brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's *default, or perhaps that the escape was the consequence of vis [271 major, or the act of God." Blackburn, J., then proceeds to give several illustrations of the rule, and amongst them the case of a person whose mine is flooded from his neighbor's reservoir, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works.

These were the cases mainly relied upon on the part of the plaintiffs; and unless a real distinction exists between the case of a private individual, who, for his own purposes, collects on his own land any liquid or other matter which will be a source of danger if it escapes, and the case of a canal made under the powers of an Act of Parliament, not for the benefit of individuals, but for objects of great "public utility and convenience," it may be that the case of *Fletcher* v. *Rylands* (3) governs the present case.

As it appears to me, however, cases which depend entirely upon the application of common law maxims to the acts of parties in dealing with their own land, or affecting their neighbor's land, cannot govern a case in which the rights and obligations of all parties are to be found within the provisions of an Act of Parliament. When the original undertakers, to whose rights and duties the defendants have succeeded, were empowered to make the canal, and were invested with extraordinary powers for that purpose; it was upon the notion that it would render the carriage of coal, &c., from the mines and of other goods cheaper than before, to the great advantage of the trade of the

(1) Law Rep., 1 Ex., at p. 279. (2) Law Rep., 3 H. L., at p. 339.
(3) Law Rep. 3 H. L., 330.

district. They were, therefore, authorized to purchase and take lands compulsorily, and to divert streams, &c., and do all things necessary for the making and maintaining of the canal, and supplying it with water for the purposes of navigation, subject only to the conditions that they should do "as little damage as might be" in the execution of their powers, and should make satisfaction for all damages which might be sustained by all owners whose lands, &c., might be affected or prejudiced by the execution of their powers. Under such conditions they proceeded to construct and maintain the canal, doing all things which were necessary to enable the canal to realize the public advantage which was anticipated; and after the lapse of so many years since the canal was constructed, it must be assumed 272] *that they complied with the conditions, and did make satisfaction to all owners whose lands were purchased or taken, or whose interests were "affected or prejudiced" by the execution of their powers.

But this was not all that the legislature conceded in the interest and for the benefit of the canal. It imposed certain restrictions upon the owners of mines lying under or within twelve yards of either side of it, who were *absolutely prohibited from getting* their minerals within that distance without the consent of the canal company, unless after a certain notice given to such company, and a neglect or refusal on the part of the company to purchase such mines; and even in that case, the mineowners were only allowed to work their mines under and within the prohibited distance of the canal upon the terms of doing no unnecessary damage to the navigation, or no extraordinary damage or injury by working them out of the ordinary and usual mode: *Dudley Canal Co.* v. *Grazebrook.* (1)

The canal having been constructed under the provisions of the Act, and satisfaction having been duly made, the canal itself, subject to the rights of the public to use it as a navigation on payment of tolls, became vested in the company, and is now vested in the defendants; and inasmuch as they have always hitherto kept and maintained it as a navigation, and have managed and conducted it without any negligence or want of care, and have themselves been guilty of no act or default, can they be made liable to the consequences of the plaintiffs working

(1) 1 B. & Ad., at p. 74.

their mines within the terms of the Act of Parliament, under which alone they could be permitted to work them?

If the restriction upon their ordinary rights of working their own mines did at the time "prejudice or affect their interest," it was a matter for compensation under the Act, the provisions of which are very different from those which formed the subject of consideration in *Bagnall* v. *London and North Western Ry. Co.* (1) The difficulty of ascertaining the value of a compensation under such circumstances may be great, but if the defendants have done nothing more than they were entitled to do under the Act, a party *prejudicially affected by the exe- [273 cution of their powers can only seek his remedy under the provisions of the Act which conferred such powers; and if the damage alleged to have been recently sustained is a consequence of the execution by the company of the powers of the Act, they may possibly obtain compensation now, inasmuch as the commissioners appointed under the Act for settling disputes as to compensation were incorporated with succession, and were authorized "from time to time" to take the steps provided by the Act for ascertaining the amount thereof. The probable damage to the canal from the working of the mines appears to have been the sole ground of the prohibition to work them; and it was probably supposed that the interests of the canal company would prevent the possibility of such a state of things occurring as appears to have happened in the present case. However that may be, the only power of working the mines is to be found in the statute; and I have come to the conclusion that, if compensation for the damage which is said to have resulted to the plaintiffs was not obtained on the making of the canal, as in respect of land which was "prejudiced or affected" thereby, the plaintiffs can only obtain it, if at all, under the provisions of the Act of Parliament, in the character of damage resulting from the execution of the powers thereof, and not by action at law. No action at law will lie unless there be a legal injury and resulting damage. Now what is the "injuria" here? Is it the declining to purchase the mines after notice? The defendants were under no other obligation to do so than such as might result from a sense of their own interest. Is there any obligation or duty to be implied which they have not fulfilled? The only

(1) 1 H. & C., 544; 31 L. J. (Ex.), 480.

obligation upon them must be found, directly, or by necessary implication, in the language of the statute; and as it appears to me, they have fulfilled every obligation imposed upon them by it. Injurious results frequently arise to individuals from the execution of works of public utility which are authorized by Acts of Parliament, such as a railway, which may be lawfully worked in an ordinary and reasonable manner, although it occasion a damnum to individuals. The reason is, that, being authorized by the legislature, the reasonable working can be no injuria. The cases upon this point are numerous, and the law is thoroughly settled. In the instance suggested by Black-
274] *burn, J., in *Fletcher* v. *Rylands* (1), of the house injured by the fumes of alkali works, if the alkali works had been authorized to be erected on the spot by Act of Parliament, no action could be maintained, if the works were carried on in a proper and usual manner.

The fact is, that legislation of the description under consideration has always proceeded upon the principle, that all damage occasioned by the execution of the powers conferred on companies should be provided for by apt compensation clauses, the very object being to prevent actions being brought for any injury occasioned by the due and proper execution of such works.

In the present case, the true position of the parties appears to me to be, that the defendants have acted strictly within the powers conferred upon them by Act of Parliament, and have performed all the conditions imposed upon them; but, inasmuch as they have declined to purchase the mines, they have not acquired under the statute the right to the support of subjacent mines, which, had they purchased the surface by a common law conveyance, they would have had; and therefore, if damage be sustained by the canal being injured by the plaintiffs' proper and usual mode of working these mines, the defendants must suffer the consequences so far as they are concerned, and cannot complain of the water being thereby abstracted from the canal; but, on the other hand, the plaintiffs are simply authorized by the statute to work their mines under the canal in an ordinary and proper manner; and if, as a consequence of their own lawful acts of working, the water is let out of the canal into the

(1) Law Rep. 1 Ex., at p. 280.

mines and to some extent impedes the complete working thereof, it is a "damnum sine injuriâ," and they cannot maintain an action against what I may call innocent parties, who have done no more than they were authorized by the legislature to do. I have shown by quotations from the judgments in *Bagnall* v. *London and North Western Ry. Co.* (1), that they proceeded upon the assumption of actual negligence, either in the mode in which the railway was constructed, or upon some supposed neglect or default as to drainage, from which they were not protected by the statute then under consideration. The cases, in which it was decided that *an action would lie, either for the com- [275 pensation assessed by the jury or by an award under the Lands Clauses Act or Railway Clauses Acts, as it appears to me, afford no authority for saying that an action will lie under circumstances like the present.

I am therefore of opinion that this action will not lie, and that our judgment must be for the defendants.

HANNEN, J. I regret that I cannot concur in the judgments which have been delivered by my Lord and my Brother Mellor.

This is an action brought by the plaintiffs, owners of certain mines lying beneath a canal of the defendants, for alleged carelessness in the management of the canal and the water therein, whereby the water escaped and flooded the mines.

The defendants, in substance, plead, that the canal was made and maintained, and the water brought and kept in it in pursuance of certain Acts of Parliament; that the mines were worked after the making of the canal; and that the water escaped therefrom into the mines without any negligence on the part of the defendants.

The defendants' canal was made under an Act incorporating the provisions of the Dudley Canal Act, 16 Geo. 3, c. 66. By that Act the company was required to make compensation for the purchase of the land taken for the canal; but the mines and minerals lying under the canal were reserved to the owners thereof. With regard to the working of the mines under and near to the canal, it was enacted (p. 1642), that if any proprietor of mines under or within twelve yards of either side of the canal

(1) 7 H. & N., at p. 448; 31 L. J. (Ex.), at p. 129; 1 H. & C., at p. 545; 31 L. J (Ex.), at p. 481; see ante, pp. 267, 268.

should be desirous of working, he should give three months notice of his intention to the company, who, if they failed to inspect the mines within thirty days, should be considered as permitting them to be worked; and if, on inspection, they refused permission, they should be compelled to purchase the same.

The reservation of the mines was subject to the proviso, that in working such mines "No injury be done to the navigation, anything therein contained to the contrary notwithstanding."

This statute has more than once been the subject of judicial interpretation; and the purpose and effect of its provisions cannot be better expressed than in the language of Bayley, J., 276] in *Dudley *Canal Co.* v. *Grazebrook* (1), "It is clear that the company do not, in the first instance, pay to the landowner more than the value of the surface in the shape of purchase-money, or for the injury to the surface, if compensation only is made for damage; the minerals remain the property of the owner of the soil; but where he is desirous of getting them, the company have the option of purchasing at a fair price, to be settled in case of dispute in the usual way. These provisions are for the benefit of the company, who are relieved from the great expense of buying the minerals along the whole line of the intended canal, in the first instance, before it is constructed; and are enabled to postpone the purchase of them until the time when, from the state of the market in the neighborhood, the owners really want to get them. When this happens, the company have an option either to buy, in which case the landowner cannot get the minerals, but is fully compensated for the loss of the right; or not to buy, in which case he receives no compensation at all, and his right to get them ought to remain as complete as if no canal had been made. In the latter case, the canal company have not paid for, and ought not, therefore, to obtain under the Act the right to prevent the landowner from enjoying his own property; and if he does exercise his right of enjoyment the company ought to run the risk of the consequences." It was further held, that the construction thus put upon the Act was not affected by the proviso, that, "in working the mines no injury be done to the navigation;" as this must be construed with some qualification, viz., "either that the party working the mines is to do no unnecessary damage

(1) 1 B. & Ad., at p. 72.

or injury to the navigation, or no extraordinary damage or injury by working them out of the usual mode." (1).

This interpretation was, in effect, subsequently adopted by the legislature in the Birmingham Canal Consolidation Act (5 Wm. 4, c. xxxiv) where, in a similar series of enactments, the proprietor is authorized (s. 95), in the event of the company refusing to purchase the mines, to work them "without being liable to the company for any damage, unless such damage be willfully done or be caused by the working of such mine in an improper manner." The decision *in *Dudley Canal Co* v. [277 *Grazebrook* (2), is approved in the recent case in the House of Lords, *Great Western Ry. Co.* v. *Bennett* (3).

It appears from the facts stated in the present case, that the plaintiffs gave notice of their intention to work the mines within the prescribed distance of the canal. The defendants did not inspect the mines, and they refused to purchase. The plaintiffs, therefore, proceeded to work the mines; and at that time the canal was in good order and condition, and properly puddled and watertight, and would have remained so if it had been undisturbed by the working of the mines by the plaintiffs. The defendants, during the working, did all in their power to keep the canal watertight; but it is found that, "when the bed of a canal has been and is in the course of being broken by mining, there are no certain means of keeping the canal watertight;" and it is also found, "that the defendants were guilty of no actual carelessness in the management of their canal, unless it were carelessness to allow the water to be in it while the mines were worked." The plaintiffs, on the other hand, "did not work their mines in any negligent, or unskillful, or improper manner (unless the working of the mines, with the knowledge that there was danger that the water would thereby escape into them, was in itself improper), but got the coal in the manner in which it is ordinarily got, and *without doing so could not have got the full benefit of their coal.*" The effect of the working of the mines was to let down and crack the bed of the canal, and to allow the water to pass through the fissures into the workings below, whereby damage was done to the mines to the amount of 400*l.*

The result of these findings is that the plaintiffs have, in fact,

(1) 1 B. & Ad., at p. 74. *(2) 1 B. & Ad., 59. (3) Law Rep., 2 H. L., 27, 39.

been to a large extent deprived of the benefit of their mines by an exercise of their rights as owners, lawful as against the defendants: *Dudley Canal Co.* v. *Grazebrook* (1) and not negligent or out of the ordinary course of mining, and without which they could *not* have enjoyed their property; that this damage would not have arisen if the defendants' canal had not been made over the plaintiffs' mines; and that the plaintiffs have never been compensated for this diminished enjoyment of their property. I think it follows, from these propositions, that the defendants 278] are responsible for the *mischief which has resulted to the plaintiffs, in some form, either by way of compensation or by action. I reserve for the present the consideration of the question, which of these two modes of proceeding is the proper one.

I think it clear that it was the intention of the legislature that the mineowner should lose no part of the value of his minerals by reason of the making or maintaining of the canal; but, if upon the refusal of the canal company to purchase, he was bound either to abstain from getting the subjacent coal, or himself to bear the consequences resulting from his getting it, he would be deprived, pro tanto, of the benefit of his property without any compensation. That this injustice was not intended by the legislature may be illustrated by a case put by Bramwell, B., in delivering judgment in *Bagnall* v. *London and North Western Ry. Co.* (2). Suppose that the canal company had thought it necessary, for the safety of their canal, to refuse permission to the plaintiffs to work their mines, and so had become bound to purchase the minerals, would the company have been entitled to contend that only a nominal price should be paid, on the ground that if the plaintiffs had worked the mines they would have been drowned, and so worthless? The language of the Act (p. 1643), as well as the reason of the thing, shows that it was intended to give the mineowner a real and not an illusory remedy for the deprivation of the right to work his mines. It follows, that if the company elect not to prevent the working of the mines, the owner is left in possession of a real and not merely of an illusory right to get the minerals, that is, he has a right to get them in the usual manner, doing no unnecessary damage to the canal, the responsibility resting with the com-

(1) 1 B. & Ad., 59. (2) 7 H. & N., at p. 450; 31 L. J. (Ex.), at p. 130.

pany of determining whether the water can be kept out of the mines during such working.

This argument, as it seems to me, can only be met by establishing that, when the canal company originally purchased the surface of the land on which the canal was made, they also made compensation for the risk which might afterwards arise to the mineowner, from his having to win his coal under a body of water liable to flood his workings. An argument in support of this contention may be derived from the fact, that the original compensation money does indeed *include the price of [279 something more than the mere surface, viz., the deprivation of the right of the mineowner, being also the surfaceowner, to work the coal in an *unusual* manner, and without regard to the surface. But the answer to this argument seems to me to be, that the right of a mineowner to work his mines in an unusual, and therefore presumably an unprofitable, manner, was considered to be of so small, if of any conceivable value, that it would not materially affect the price to be assessed for the surface; or, at any rate, that the elements for estimating its value would all be capable of being ascertained at the time of taking the surface. But very different considerations are applicable to the prospective assessment of the compensation to be paid for the risk of working unopened mines, at some wholly uncertain time, under a canal, after it shall have been in existence perhaps for a hundred years (1). It would be perfectly impossible to make such an assessment with any approach to accuracy. It would be a mere guess, with almost a certainty of doing injustice, either by not giving the mineowner a sufficient compensation for a danger, distant, indeed, but not the less serious when it arises, or by making the canal company substantially pay at once the value of the coal which the owner may never lose, a result which would deprive the company of the benefit which it was intended to confer on them, of having the payment for unopened mines postponed until they should be required, and their value better ascertainable.

These observations on the Canal Acts are supported by the authority of the Exchequer Chamber, when dealing with the analogous provisions of the Railway Acts. Willes, J., in delivering the judgment of the Court, in *Bagnall v. London and*

(1) The governing Act in this case is of the year 1775. [Note by the judge.]

North Western Ry. Co. (1) says: "There are practical obstacles of an insuperable character against saying that there arises, upon the making of the railway, an immediate right to compensation in respect of possible future injury to unopened mines. At that time it does not appear that the mines will ever be worked, nor that the drains will not always be kept in proper order, so that the company might contend that peradventure no damage would ever arise, and an assessment of damages in ad-
280] vance would be mere speculation." *This reasoning lands me to the conclusion that the legislature intended that the plaintiffs' predecessors in title should not be, and that in fact they were not, when the surface was taken in order to make the canal, compensated for diminution in the value of their property caused by the impossibility, now found to exist, of getting the coal under the canal without letting in the water.

I think, therefore, that the plaintiffs are now entitled to some redress for this diminution in value.

This brings me to the consideration of the question whether that redress should be sought under the compensation clause of the Act or by action.

I regret that it should be necessary to express an opinion on this point. It was not contended by counsel for the defendants that the remedy by action was improper, if the plaintiffs were entitled to any remedy, nor is this one of the points stated for argument. I thought that the question which the defendants, as well as the plaintiffs, were desiring of having determined was, whether the defendants were liable in any form, and not whether this was the proper form of remedy. But as the point was not formally abandoned, it becomes necessary to dispose of it.

The compensation clause of 16 Geo. 3, c. 66 (p. 1603), is very comprehensive in its terms, it extends to recompense for any damages which may or shall be, at any time or times whatsoever, sustained by owners of lands, &c., for or by reason of the making, repairing, or maintaining the said canal, or by supplying the same with water, or by the flowing, leaking, or oozing of the water over or through the banks, or by reason of the execution of any of the powers contained in the Act. The effect of this compensation clause is to give a recompense to any one

(1) 1 H. & C., at p. 546; 31 L. J. (Ex.), at p. 481.

injured by the execution of the powers of the statute, by the direct operation, or necessary consequence of any act authorized by the statute, and which, but for its enactments, would have been the subject of an action. On the other hand, damage, not being the direct result or necessary consequence of an act authorized by the statute, is excluded from the compensation clause, and remains the subject of an action. It is obvious that there must be many heads of damage as to which it is difficult to determine whether to place them on the one side or the other of the border line, dividing things which are the *necessary consequence of the execution of the powers of [281 the Act from those which are not. The present case forms an illustration of that difficulty, but if I am right in the conclusion, that the plaintiffs are entitled to recompense for the damage they have sustained, I think we ought not to be astute to discover that they have selected the wrong remedy. Upon the facts stated in the special case, I think it appears that the drowning of the plaintiffs' mines was not the necessary consequence of the execution of the powers of the Act, but might have been prevented by the defendants. This mischief might have been prevented in one of two ways, either by purchasing the mines or by drawing off the water. It is true the defendants were not under a legal obligation to purchase the mines; but, when the time came for them to determine whether they would purchase or not, they were bound, in my judgment, to consider all the means available to them of preventing the escape of the water from the canal, and amongst these was the power to purchase the subjacent coal. The defendants either disregarded this consideration, or erred in their judgment, and the result shows that they could not keep their canal watertight without purchasing the coal. It was therefore a wrongful act on their part to keep the water in the canal without having taken the means in their power, by the expenditure of a certain sum of money, to prevent the mischief which has happened. The defendants knew, or ought to have known, that the probable result of working the mines would be to let the water through. They had not originally purchased the right to prevent the plaintiffs doing that which would probably crack the bottom of the canal; they were bound, therefore, to take all necessary measures to prevent the water which they had brought over the plaintiffs' mines from

penetrating into them, and, if no other means were attainable, they ought to have bought the plaintiffs' coal.

I cannot bring my mind to the conclusion that the legislature intended that the defendants, having paid only for the right to bring water on to the surface, and not having paid for the coal below, should make use of their occupation of the surface as a means of coercing the plaintiffs into abandoning their coal for nothing; and if this was not intended, the defendants were bound to exercise their option of purchasing the subjacent coal, 282] not *merely with reference to the safety of their canal, but with reference to their duty towards the plaintiffs of keeping the canal water-tight; and they must be responsible for their error in judgment in supposing that they could retain the water in its channel without purchasing the coal below. It is possible,—though it does not appear from the case,—that the price which the defendants would have had to pay for the coal would have so much exceeded the damage likely to accrue to the mine and to the canal from getting the coal, that the defendants preferred to run the risk of having to pay for the damage to the mines rather than purchase them; but, though this may have been prudent on the defendants' part, it does not relieve them from the duty to make compensation by way of damages for any mischief which they have, for their own interest, allowed to fall on the plaintiffs. But further, the case shows that the defendants had the means of preventing the mischief; for it appears from paragraphs 20 & 21 that, although the defendants refused to draw off the water of the canal in order to enable the plaintiffs to get their coal, they did, for their own purposes, draw off the water for a time, and altogether stopped the through navigation of the canal, while the mines were being worked; and I think they were justified in doing so. Under ordinary circumstances, it was the duty of the canal company to keep the navigation open, but they might lawfully stop it, if such a course was necessary in order to do any repairs required for the safety of the canal, or to effect any other necessary purpose; and, if they could not otherwise avoid doing mischief to neighboring property, they might stop the navigation for a reasonable time while they provided the necessary safeguards. This would be clear, if they could not otherwise prevent the water of the canal flooding a neighboring house; and I think

they ought to have stopped the navigation to prevent the drowning of the plaintiffs' mines, if they could not prevent it by other means; and the fact that they did so leads me to the conclusion that they could practically have kept the water drawn off from the whole 150 yards over the mines, if their sole object had been to protect themselves and not to prejudice the plaintiffs.

But it is suggested that, when the defendants refused to stop the working and to give compensation for the mines, a right at once *accrued to the plaintiffs to demand compensation [283 for this inability to work the mines without letting in the water. I do not think that this is the meaning of the legislature. It would be a singular mode of dealing with the subject to allow the company the option whether they would purchase the coals or not, and yet to make the exercise of that option give rise to a claim to compensation for the coals which they had refused to purchase. This would render the option practically useless to them. Suppose that the value of the coal which the defendants refused to purchase was 1000*l.*, and that it was clear that the coal could not be gotten without some damage, what compensation could then be assessed? Plainly not the 1000*l.*; for that would be to make the defendants pay by way of compensation the price of that which they had, in the exercise of their right, refused to purchase; and if anything less than 1000*l.* should be given, why should it be assessed prospectively, while the true amount must be matter of speculation, rather than after the extent of damage had been ascertained by experience of the facts? I think, therefore, that the defendants, by the mere refusal to purchase, gave no ground of claim to the plaintiffs; but the defendants were bound, in determining whether they would purchase or not, to exercise their judgment as to what the probable effect of getting the coals would be; the responsibility of forming an opinion, as to the danger of the water escaping and the means of preventing it, was cast entirely on them, and not on the mineowners, who were left, by the refusal to purchase, in full possession of the undiminished right to get their coal as they could, doing no unnecessary damage to the canal, and working in the usual way.

I am of opinion, therefore, that the plaintiffs may maintain this action against the defendants for retaining the water in the canal under circumstances, which they knew would render it

incapable of holding the water, and which they had the means of preventing. The difficulty which I felt, on the argument, in deciding that the plaintiffs were entitled to recover, arose from the fact that the damage of which they complained was the direct result of their own acts, done with a knowledge of the probable consequences; but this difficulty has been removed from my mind by the consideration, that the plaintiffs' acts were done strictly within the limits of their own rights, and solely 284] for the purpose of enjoying *their property in a lawful and usual manner, and were necessary for that purpose, and after the defendants, with notice of the facts, had refused to take steps within their power to prevent what has happened. This brings the case within the principle of the decision of the House of Lords in *Fletcher* v. *Rylands* (1) as expressed in the passage quoted by the then Lord Chancellor (Lord Cairns) from the judgment delivered by Blackburn, J., in the Exchequer Chamber (2):—"We think that the true rule of law is, that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape." It is added: "He can excuse himself by showing that the escape was owing to the plaintiff's default." But, for the reasons which I have given, I think the defendants in this case cannot set up such excuse; for the plaintiffs have been guilty of no default; they have merely sought to enjoy their own property in an ordinary manner. If a water company were to carry their pipes or store their water over the Metropolitan Railway, and the vibration of the trains were to loosen the pipes or reservoir and cause the water to flow down and do injury to the railway, the water company would not be entitled to defend themselves against a claim for damages by saying that the railway company ought not to have run their trains: the answer would be that the railway company in running the trains did no more than they were allowed to do in the exercise of their legal rights; and that the water company, knowing these rights, ought to have taken care, at their peril, that the water should not escape in consequence of acts which the railway company had a right to do. This illustration may be open to the objec-

(1) Law Rep. 3 H. L., at p. 339. (2) Law Rep. 1 Ex., at p. 279.

tion that it is idem per idem; but it will nevertheless assist in showing the relation in which, as it seems to me, the plaintiffs and defendants stand to one another.

It may be suggested that the principle laid down in *Fletcher* v. *Rylands* (1) is not applicable to the case of a company empowered by an Act of Parliament to collect and keep on its land anything likely to do mischief,—and to this I assent, if the escape be the *necessary consequence of bringing the [285 liquid or other thing, to the place, and in the manner authorized; and to the extent to which oozing of water through the banks of the canal is the necessary consequence of maintaining the water in it, the remedy for the mischief thereby done must be sought under the provisions of the Act; but for anything, not authorized by the Act, nor the necessary consequence of the exercise of its powers, the person or company bringing the noxious thing on to his land is equally responsible whether the right to bring it there was obtained by Act of Parliament or by any other means. In the present case, I have endeavored to show that, though the right to bring the water of the canal over the plaintiffs' mines was given by parliament, the right to flood the mines, under the circumstances appearing in this case, was not given, and that for injury resulting therefrom the defendants are responsible.

For these reasons I am of opinion that our judgment should be for the plaintiffs.

Judgment for the defendants.

Attorney for plaintiffs: *Warmington.*

Attorneys for defendants: *Tucker & Lake, for Ingleby, Wragge, & Evans, Birmingham.*

(1) Law Rep. 3 H. L., 330.

Jan. 31, 1872.

*NEWBY v. VON OPPEN and THE COLT'S PATENT FIREARMS MANUFACTURING COMPANY. [293

Law Reports, 7 Queen's Bench, 293.

Foreign Corporation — Liability to be sued in England — Practice — Service of Writ.

A foreign corporation, carrying on business in England, although not incorporated according to English law, may be sued as defendants in an English court, in respect of a cause of action which arose within the jurisdiction.

So *held*, on motion to set aside service of writ.

Service of a writ of summons on the head officer of an English branch of a foreign corporation carrying on business in England is good service, and it is not necessary to serve the process on the officer at the head office abroad.

RULE to set aside an order of one of the Masters.

The rule, the facts of the case, arguments, and cases cited, appear in the judgment.

Jan. 18. *Manisty*, *Q.C.*, and *Philbrick*, showed cause.

Edward Clarke, in support of the rule.

Cur. adv. vult.

Jan 31. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Quain, JJ.), was delivered by

BLACKBURN, J. This was a rule obtained to show cause why an order of Master Unthank, setting aside the writ and service so far as regarded The Colt's Patent Firearms Manufacturing Company, should not be rescinded.

Cause was shown in this term, before the Lord Chief Justice, my Brothers Mellor, Quain, and myself, by Mr. Manisty and Mr. Philbrick; and Mr. Clarke was heard in support of the rule; and the Court took time to consider.

The facts do not appear to have been very distinctly brought before the master at chambers, but we take them to be as follows: The Colt's Patent Firearms Manufacturing Company is not an English corporation; it is an American company, incorporated by American law; but this foreign corporation has a place of business in England, and there de facto carries on business just as an English corporation might do, though their 294] principal place of *business and head office is in America. The contract which the plaintiff alleges to have been broken was, as he alleges, made in England by the foreign corporation thus carrying on business here. The writ was served on the manager of their business in England, who appears to be the head officer, and indeed the only officer, of their English branch, but who certainly was not the head officer of the American corporation in the United States.

Two points were raised and argued before us. It was said that a foreign corporation cannot be sued as defendants in an

English court at all. If so, there is no remedy at all in an English court to enforce a contract made with a foreign corporation, inasmuch as the individuals who constitute the foreign corporation cannot be made liable personally on its contracts or for its torts: see *General Steam Navigation Co.* v. *Guillou.* (1)

There can be no doubt, since the cases of *Dutch West India Co.* v. *Van Moses* (2) and *Henriques* v. *Dutch West India Co.* (3)—which was a proceeding against the bail of the defendant in the other case, and was affirmed in the House of Lords—that a foreign corporation can sue as plaintiffs. Lord Raymond, in a note, tells us that the original cause was tried at nisi prius, before Lord King, when Chief Justice of the Common Pleas, in 1734, when it appeared that the cause of action accrued in Holland; and adds: "And upon the trial Lord Chancellor King told me he made the plaintiffs give in evidence the proper instruments whereby by the law of Holland they were effectually created a corporation there. And after hearing the objections made by the counsel for Jacob Senior Henriques Van Moyses, he directed the jury to find for the plaintiffs, who accordingly did, and gave them 13,720*l.* damages; and afterwards a motion was made in the Common Pleas to set aside the verdict; but by the unanimous opinion of that Court the motion was denied." This points to a difficulty which arose both in *General Steam Navigation Co.* v. *Guillou* (1) and in *Ingate* v. *Austrian Lloyd's Co.* (4), for it must often be a nice and difficult question whether a continental company is really, by the law of its own country, a corporation or not; but no such difficulty arises where the company is one belonging to Scotland, or one of our *own [295 colonies, or to those parts of the United States where the common law prevails. In the *Carron Iron Co.* v. *Maclaren* (5) the Master of the Rolls had granted an injunction against the appellants, a Scotch, and therefore a foreign, corporation. The injunction was dissolved on the ground that the appellants were foreigners, and as such entitled to the advantage which the law of their own country gave them; but no objection was raised on the ground that the court of equity could not treat a foreign corporation as a defendant. It is true that we are not aware

(1) 11 M. & W., 877.
(2) 1 Str., 612.
(3) 2 Ld. Raym., 1532.
(4) 4 C. B. (N.S.), 704; 27 L. J. (C.P.), 323.
(5) 5 H. L. C., 416.

of any reported case in which a foreign corporation has been sued in a court of law, but it seems to follow, from their being permitted to sue as plaintiffs, that they must be suable as defendants. It is, however, enough to say that we will not, on this ground, prevent the plaintiff from proceeding. The corporation may, if so advised, raise the question after appearing on the record.

The other and more difficult question is, whether the corporation has been properly served, supposing them to be suable. It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction, subject to the difficulties which are pointed out in *Ingate* v. *Austrian Lloyd's Co.* (1) This would be so, if the foreign company had merely employed an agent here, who made a contract for them; but we think it is different where the foreign corporation actually has a place of business and trades in this country. This is a point of very considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see, from this case, that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such a corporation does, for many purposes, reside both in England and in its own country. In the case of *Carron Iron Co.* v. *Maclaren* (2) Lord St. Leonards, taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think that there is great good sense in what Lord St. Leonards states to be the law on his view of the facts.
296] He says: "If the service on the agent is *right, it is because, in respect of their house of business in England, they have a domicile in England; and, in respect of their manufactory in Scotland, they have a domicile there. There may be two domiciles and two jurisdictions; and in this case there are, as I conceive, two domiciles and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business one is just as much the domicile of the corporation as the other." The majority of the Lords took a different view of the facts, and thought that, though the corporation possessed property in England, and had agents there,

(1) 4 C. B. (N.S.), 704; 27 L. J. (C. P.), 323. (2) 5 H. L. C., at p. 459.

they did not carry on business there; but we do not find that they differed from Lord St. Leonards' view of the law if they had agreed as to his facts; and in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there.

One more point has to be noticed. At common law the service of a writ on a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation, and then proceeding by distress: see 1 Tidd's Practice, p. 121, ed. of 1828. The 2 Wm. 4, c. 39, s. 13, and 15 & 16 Vict. c. 76, s. 16, in fact only re-enact the old law as to what should be service on a corporation. The clerk or officer must be in the nature of a head officer, whose knowledge would be that of the corporation. We think that, when once it is established, that the corporation is to be treated as resident in England, the proper officer is the officer at the English branch, and that it is not necessary to serve the process on the officer at the head office abroad.

We have been furnished, by the courtesy of Mr. Horace Lloyd, as amicus curiæ, with the papers in a case of *Roberts* v. *Grand Trunk Ry. of Canada.* (1) It appears that the defendants, being a Canadian corporation, had a board of directors who acted for them in England. The writ was served on the secretary of that board, and on an affidavit of service judgment was signed. Crowder, J., at chambers stayed all proceedings on the judgment, on the terms that the defendants should bring money into court. *The case was, therefore, in its cir- [297 cumstances very similar to the present. The present Chief Justice of the Common Pleas, on an affidavit of these facts, and an affidavit of merits, obtained in the Exchequer a rule nisi to set aside the judgment. The rule was made absolute: The defendants to appear in ten days. The money to remain in court to abide the order of the Court or a judge. Costs of the application to be costs in the cause."

If we could be sure that this was the judgment of the Court pronounced in invitos, it would seem clear that the Court of Exchequer thought the judgment regular, and only to be set

(1) Not reported.

aside on terms, and it would therefore be an authority in favor of the view we take. But we rather think that the matter was settled by the agreement of counsel, without the Court being called on to pronounce any opinion on the subject; and therefore we do not rely on this as a decision.

The result is that the rule in the present case must be made absolute.

Rule absolute.

Attorney for plaintiff: *G. E. Thomas.*
Attorneys for defendants: *Harper, Broad, & Battcock.*

Jan. 24, 1872.

304] *CORY and another v. PATTON.

Law Reports, 7 Queen's Bench, 304.

Marine Insurance — "Slip" — Policy — Concealment of Facts Material to Risk.

Where underwriters have (as by initialing a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honor and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed.

DECLARATION upon a policy of assurance, whereby the plaintiffs, by their agents, caused themselves to be insured, lost or not lost, at and from Blythe to Port Said, upon any kind of goods and merchandises; and also upon the furniture of and in the ship *Ceylon*. Averments that the defendant subscribed the policy for 80*l.*; that the goods were shipped and were by the perils insured against wholly lost.

Plea: That at the time of the making of the policy of insurance the plaintiffs concealed from the defendant a fact then known to the plaintiffs, and not known to the defendant, and material to the risk, that is to say, that the ship, having set sail and departed on the voyage with the goods on board, had met

with an accident and misfortune whilst proceeding on the voyage.

Replication: That before the plaintiffs had any knowledge of the material fact, they being at a distance from the defendant, by a letter written by them to their agent, instructed their agent to effect the insurance, and the plaintiffs had no knowledge of the material fact until after the lapse of a reasonable time for their agent to agree with an underwriter or underwriters to insure the goods, and to settle with him or them the terms and premium on and for which the insurance should be effected; and that in the ordinary course of business their agent ought to have agreed and settled as aforesaid before they, the plaintiffs, knew of the material fact; and that before they knew the fact, the agent did apply to the defendant as such underwriter to insure the goods, and settled and arranged with the defendant the terms and premium on and for which the defendant would insure the same; and *the defendant made a parol agree- [305 ment with the agent to insure the same, on those terms and for that premium, and became in honor, conscience, and good faith, though not in law, bound to subscribe a policy for insuring the goods on those terms and for that premium; and that if the material fact, and the plaintiffs' knowledge of it, and premises aforesaid, had afterwards been made known to the defendant, he would still in honor, conscience, and good faith, have been bound to subscribe and bind himself by such a policy as aforesaid; and that the policy in the declaration mentioned, is the policy which the defendant was so bound to subscribe as aforesaid; and that the plaintiffs, knowing, as the fact was, that in due course of business at the time when they first had knowledge of the said material fact, either a policy for insuring the goods in pursuance of their instructions would be effected, or that such an agreement would be made by some underwriter or underwriters, which would in honor, conscience, and good faith, bind him or them to subscribe a policy for effecting the insurance, did in good faith abstain from communicating the material fact to their agent, or to the defendant, which is the concealment mentioned.

Demurrer and joinder.

1871. Nov. 27. *Watkin Williams*, in support of the demurrer.

By the usage of underwriters a slip is deemed to be a moral obligation; but it does not bind the parties at law or in equity. The only legal contract is a policy, and that, in this case, was vitiated by the assured having concealed from the underwriter a material fact which it was their duty to disclose.

[BLACKBURN, J., referred to *Ionides* v. *Pacific Insurance Co.* (1).]

That case is primâ facie adverse; but there the underwriters had by the general character of their undertaking waived all disclosure. In Duer on Marine Insurance, vol. ii, p. 410, par. 19, it is said, that if a principal instructs an agent to insure and "subsequently receives intelligence of a loss, or of any event that alters or enhances the risk he desires to be covered, he must be prompt to convey the information, if there is any probability that it will reach the agent in time to prevent the com-
306] pletion or regulate the *terms of the insurance. His omission to employ for this purpose that due diligence which the law requires, will be deemed a fraudulent and a fatal concealment."

[LUSH, J. The American law does not vitiate an unstamped slip, and that makes a distinction between the doctrines laid down in the text books of that country and our own.]

The effect of the stamp laws here is that there can be no binding agreement until the execution of a policy. In *Mead* v. *Davidson* (2) a policy executed after loss known to both parties was held good; but Lord Denman, C.J., said that, on authority, "and indeed on the plainest general principles, if the loss had been known to the assured only, the policy would be void." When *Xenos* v. *Wickham* (3) was decided in the House of Lords, the statutes, then requiring contracts of marine insurance to be in writing and stamped, annulled contracts which were not so, and the slip itself had no binding force; and it was only of avail as a proposal, or an order for a complete contract or policy of insurance. 30 Vict. c. 23, ss. 7, 9, still renders the slip invalid as a contract (4).

(1) Law Rep., 6 Q. B., 674.
(2) 3 Ad. & E., 303, 308.
(3) Law Rep., 2 H. L., 296.
(4) 30 Vict. c. 23, s. 7: "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Amendment Act, 1862), shall be valid, unless the same is expressed in a policy; and every policy shall specify the particular risks or adventure, the names of the subscribers or underwriters, and the sum or sums insured; and in case any of the above-mentioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes.'

Sect. 9: "No policy shall be pleaded

Even equity would not give effect to such an instrument: *Ridgway* v. *Wharton* (1).

[BLACKBURN, J. But that it is "binding in honor and conscience," is admitted by the demurrer to the replication.]

Mackenzie v. *Coulson* (2) is directly in point, to show that the slip cannot be looked at.

Butt, Q.C. (*Hugh Shield* with him), contrâ. With respect to the course of insurance business in America, "By the usage of all the insurance companies in the city of New York, the application for insurance is made in writing. When it is accepted and the sum *insured, and the rate of premium inserted, it is [307 signed by the applicant and the president of the company, and constitutes a perfect contract." And the usage is similar, "it is believed, in the other states of the Union:" Duer on Marine Insurance, vol. i, p. 107. The passages already cited from the same work obviously refer to the period before any binding contract whatever is made. Here the slip initialed was a contract binding in honor and conscience, according to the practice of underwriters, and nothing which subsequently happened would induce them to decline to execute a policy; therefore the plaintiffs were exonerated from the necessity of disclosing the loss.

[LUSH, J. There is no averment of the usual course of business in the replication.]

The slip is the "complete and final contract between the parties:" *Ionides* v. *Pacific Insurance Co.* (3) The earlier Stamp Acts are repealed by 30 Vict. c. 23 (4), and by s. 7, no contract or agreement shall be valid unless expressed in a policy. Here it is expressed in a policy, which must be treated as if made on the date of the slip.

MELLOR, J. The argument is, that when they sign the slip the parties contemplate that all has been disclosed, and that time is the time of the bargain.]

Yes. The policy is often executed a long time after the agreement for it. In fact, insurance clubs, as a rule, never execute a formal policy until there is a dispute, and it is necessary to do so in order that an action may be brought.

or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped."

(1) 6 H. L. C., 238.
(2) Law Rep., 8 Eq., 368.
(3) Law Rep., 6 Q. B., at p. 685.
(4) Ante, p. 306, n. (3).

Watkin Williams, in reply.

Cur. adv. vult.

Jan. 24. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. The declaration in this case is on a marine policy of insurance. The plea is that, at the time of the making of the policy, the plaintiffs concealed from the defendant a material fact, then known to the plaintiffs and not known to the defendant. There is a replication to this plea, to which there is a demurrer, which was argued in the sittings after last Term, 308] before my Brothers *Mellor, Lush, and myself, by Mr. Watkin Williams, for the defendant, and Mr. Butt, for the plaintiffs.

From the statements of counsel, we learned that the replication was intended to confess the plea, and assert, by way of avoiding it, that the plaintiffs had no knowledge of the material fact till after the slip was initialed; and to aver, as a fact, what was assumed in the judgment of this court in *Ionides* v. *Pacific Insurance Co.* (1), that "the slip is in practice and according to the understanding of those engaged in marine insurance the complete and final contract between the parties, fixing the terms of the insurance and the premium; and neither party can, without the assent of the other, deviate from the terms thus agreed on without a breach of faith;" though for fiscal purposes the legislature have enacted that this contract shall not be enforceable at law or in equity. Some doubt was entertained whether the replication did really raise the question, and leave was offered to the plaintiffs to amend on the usual terms; of which, however, they declined to avail themselves. We think that the replication, as it stands, would be proved by proof of the facts which we have just stated. The practice and understanding of merchants is not a matter of law, and it is open to the defendant at the trial to contend, on the traverse of this replication, that the practice and understanding is not such as is averred; but on this demurrer we must take it to be truly stated, and that being assumed, the question must be determined, whether this excuses the concealment of a fact, which came to the know-

(1) Law Rep., 6 Q. B., at pp. 684–5.

ledge of the plaintiffs after the execution of the slip and before the policy was made.

Mr. Williams quoted authorities to show, that the assured must use due diligence to make his agents who are negotiating a policy aware of all material facts which freshly came to his knowledge pending the negotiation; nor do we at all question this doctrine.

On the other hand, it is quite clear that there is no obligation to disclose any matter which first comes to the knowledge of the assured after the policy is made. And we cannot doubt that, if there was a complete contract to execute a policy enforceable in a court of equity (which the slip in America appears to be: 1 Duer, p. 107) the court of equity would compel the party to execute the *policy as of the date when he was bound to [309 have executed it, notwithstanding any intervening facts, on the principle that in equity the thing is considered as done when it ought to have been done. See, as to a subsequent fire, *Paine* v. *Meller*. (1)

The non-disclosure of a fact after the policy was made in equity, could have no more effect than a similar non-disclosure after it was made in law. The present is an intermediate case, and the question which must now be determined seems to us to be whether, after the negotiation is complete and the contract made, in fact and in good faith, and the underwriter is under a moral obligation to execute a formal policy, the assured is bound by good faith to give information to the assurer of a matter which would make him aware that his bargain was a bad one, information which ought to have no effect on him, but would expose him to a temptation to break his contract, which, as far as the law is concerned, he may do with impunity, because for fiscal purposes the legislature has forbidden the court, either of law or equity, to enforce the contract. To the question thus stated the answer seems obvious, that he is not bound to lead his neighbor into temptation. Until lately, no question of this sort could be raised in any court, for the rules of evidence required that the contract, being written, should be proved by the production of the writing, the slip; and Lord Ellenborough, in *Warwick* v. *Slade* (2), accurately expressed the effect of the statutes then in force, when he said, "The revenue laws forbid

(1) 6 Ves., 349, 352.

(2) 3 Camp., 127.

me to look to what is called the slip;" and such continued to be the law down to and after the time when *Xenos* v. *Wickham* (1) was argued in the House of Lords; and the judges who (on the 8th of May, 1867) gave their opinions, in the House of Lords, used language showing that they thought that the law was as stated by Lord Ellenborough; and so it was. These passages were quoted and relied on in the argument before us. But in that very year, on the 31st of May, 1867, the 30 Vict. c. 23 received the royal assent. This statute was not brought to the notice of James, V.C., in *Mackenzie* v. *Coulson*.(2) According to the construction put upon it by this Court, in *Ionides* v. *Pacific* 310] *Insurance Co.* (3), that *Act completely changed the law, and repealed all those Acts which had ordered that the slip was not so much as to be looked at in a court of justice, putting it on a footing very similar to that of an unsigned memorandum of a contract within the Statute of Frauds, or a lease for more than three years not under seal, viz., that it was void and not enforceable at law or in equity, but might be given in evidence wherever, though not valid, it was material.

It is open to the defendant, in a court of error, to question the accuracy of the reasoning on which the judgment in *Ionides* v. *Pacific Insurance Co.* (3) proceeded, but we think that, whilst it stands unreversed, it leads irresistibly to the conclusion that the judgment in the present case should be for the plaintiffs.

Judgment for the Plaintiffs.

Attorney for plaintiffs: *J. MacDiarmid.*

Attorneys for defendant: *Ingledew, Ince, & Greening, for Ingledew & Ince, Cardiff.*

(1) Law Rep. 2 H. L., 296.
(2) Law Rep. 8 Eq., 368.
(3) Law Rep. 6 Q. B. 674.

*CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF COMMON PLEAS

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

[IN THE EXCHEQUER CHAMBER.]

*Mollett and others v. Robinson. [84

Law Reports, 7 Common Pleas, 84.

Principal and Agent — Contract by Brokers — Usage of Market.

The defendant, a merchant in Liverpool, employed the plaintiffs, tallow-brokers in London, to buy tallow for him in the London market.

In an action brought by the plaintiffs against the defendant to recover the loss upon the re-sale of the tallow, which the defendant had refused to accept, it was proved "That there exists an established custom in the London tallow-trade, for brokers, when they receive an order from a principal for the purchase of tallow to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities, at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought-note for the specific quantity ordered by them; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from

their principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other."

All the dealings between the plaintiffs and the defendant were carried out in accordance with the above custom, which, however, does not exist in Liverpool, and was unknown to the defendant:—

Held, by Kelly, C.B., Channell, B., and Blackburn, J., that the employment of the plaintiffs by the defendant was an employment to buy according to the usages of the London tallow-market, and that the defendant was bound by those usages, notwithstanding he was ignorant of their existence.

Held, by Mellor and Hannen, JJ., and Cleasby, B., that the plaintiffs, having been employed as brokers to make the contract for the defendant, and having professed to act as brokers, and charged brokerage for their services as such, were not entitled, as against a person unconnected with the London tallow-market and ignorant of its usages, to set up a custom or usage that they should fill a different character, and become themselves principals in the transaction instead of brokers.

APPEAL by the defendant against the decision of the Court of Common Pleas in discharging a rule to set aside a verdict found for the plaintiffs and to enter a nonsuit.

85] *The pleadings are sufficiently set out in the report of the case in the court below. (1) The material parts of the appeal case were as follows:—

6. The plaintiffs are sworn brokers carrying on business in the city of London under the firm of Mollett, Bull, & Unsworth, and the defendant is a merchant at Liverpool. The plaintiffs and the defendant had previously to the transactions in question in this cause had several dealings together in the buying and selling of tallow.

7. On the 2d of April, 1869, the defendant met the plaintiff Unsworth at Liverpool, and gave him an order to buy for him 50 tons of tallow, June delivery, at 46*s.* 6*d.*, and the same day Unsworth telegraphed to his firm in London to execute the order.

8. On the same day, the plaintiffs, after the receipt of the telegram in London, wrote and sent to the defendant the following letter and bought-note:—

(1 Law Rep., 5 C. P., 646.

"London, 2d April, 1869.

"Sir, — We have received a message to buy for your account 50 tons tallow, June delivery, at 46*s.* 6*d.*, and which we succeeded in doing, since when our market has further improved, and we close 46*s.* 6*d.* @ 46*s.* 9*d.* for April, June 47*s.*, nearest price June 46*s.* for October, December."

"London, 2d April, 1869.

"C. J. Robinson, Esq. — We have this day bought for your account 50 tons nett, in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868–9, at 46*s.* 6*d.* per cwt. &c., &c.

(Signed) "Mollett, Bull, & Unsworth, sworn brokers."

9. On the 28th of April, the defendant sent a further order by telegram from Liverpool to the plaintiffs in London, as follows,— "Messrs. Mollett, Bull, & Unsworth, London. Buy 200 tons tallow for June, best terms:" and on the same day the defendant confirmed this telegram by the following letter addressed to the *plaintiffs, — "I sent you a telegram this afternoon [86 to buy 200 tons tallow for June on best terms, which I now confirm: 100 tons are for myself, and 100 for a friend of mine; but book them all to me or my firm."

10. On the same day, and in reply to this telegram, the plaintiffs wrote to the defendant a letter inclosing a bought-note, as follows: —

"London, 28th April, 1869.

"Dear Sir, — We thank you for your telegram of to-day, to buy 200 tons tallow for June on best terms. Our market opened very good, and soon 44*s.* 3*d.* was paid for April, and 44*s.* 6*d.* for June; but, just before going on 'Change, we received your message, and, as there was a temporary dullness, we fortunately succeeded in picking up your 200 tons at 44*s.* 3*d.*, and now have much pleasure in inclosing contract."

"London, 28th April, 1869.

"C. J. Robinson, Esq. — We have this day bought for your account 200 tons nett in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868–9, at 44*s.* 3*d.* per cwt., &c., &c.

(Signed) "Mollett, Bull, &Unsworth, sworn brokers."

11. Upon the receipt of the above-mentioned orders from the defendant, the plaintiffs made purchases of tallow from other brokers in the trade, in the manner hereinafter described.

12. On receiving the defendant's order of the 2d of April, the plaintiffs entered into a contract with one W. Sharman, a Russia broker trading under the firm of W. W. Simpson & Co., for the purchase of 150 tons of tallow, intending to appropriate 50 out of these 150 tons to the defendant's order, and 100 to another order which the plaintiffs had received from another person; and the plaintiffs made out and sent to Simpson & Co., a sold-note, and received from them a bought-note, in respect of these 150 tons, of which the following are copies:—

"London, 2d April, 1869.

"Messrs. W. W. Simpson & Co.

"We have this day sold for your account 150 tons nett in
87] casks *of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868–9, at 46*s.* 6*d.* per cwt., &c., &c.

(Signed) "Mollett, Bull, & Unsworth, sworn brokers."

"Brokerage, ½ per cent."

"Bought for account Messrs. Mollett, Bull, & Unsworth, 150 tons nett in casks of St. Petersburg first sort yellow candle tallow, new, and of the brack of 1868–9, at 46*s.* 6*d.* per cwt., &c., &c.

(Signed) "W. W. Simpson & Co."

"Commission, ½ per cent."

13. On receiving the defendant's second order, of the 28th of April, the plaintiffs entered into a contract with Messrs. Rayner & Co. for the purchase of 200 tons of tallow, and into a contract with Simpson & Co. for the purchase of 150 tons of tallow, intending to appropriate to the defendant's second order the 150 tons and 50 tons out of the 200 tons; and on the 28th of April bought and sold notes (in the same form as those above set out) were passed between the plaintiffs and Rayner & Co. and Simpson & Co.

14. Settlements of transactions in tallow are usually made in London in the months of April, May, and June, respectively; and on the May settlement Sharman, trading under the firm of

W. W. Simpson & Co., failed, and was unable to meet his engagements. Thereupon, the plaintiffs and Simpson & Co., having many transactions together outstanding in respect of the sale and purchase of tallow, balanced and settled an account thereof, wherein the quantity of tallow sold was set off against the quantity of tallow purchased by the plaintiffs on account of Simpson & Co., whereby it appeared that the plaintiffs had sold between 100 and 200 tons more than they had purchased on account of Simpson & Co.

16. On the 31st of May and 1st of June, the plaintiffs sent the defendant letters inclosing respectively notices that they were ready to deliver 117 casks or 50 tons of tallow in accordance with the defendant's order of the 2d of April, 1869, and to deliver 175 casks or 75 tons in part fulfillment of the defendant's order of the 28th of April.

*18. On the 8th of June the plaintiffs sent the defendant [88 a letter inclosing a notice that they were ready to deliver 170 casks or 75 tons more tallow in further fulfillment of the defendant's order of the 28th of April. Inclosed were two invoices, one, dated the 7th of June, in respect of the above 175 casks of tallow, and the other, dated the 8th of June, in respect of the 117 casks.

19. On the 9th of June, the defendant acknowledged the receipt of that letter and the inclosures.

20. On the 11th of June the plaintiffs wrote to the defendant a letter, inclosing an invoice in respect of the 170 casks of tallow.

21. On the 14th of June the plaintiffs sent a letter to the defendant, informing him as to the state and prospects of the tallow-market, and suggesting a remittance for the prompt payable the following day.

22. The defendant, having before the 15th of June ascertained that Simpson & Co. had failed and had not themselves tendered the tallow, gave notice to the plaintiffs that he would not accept the tallow.

23. On the 15th of June the plaintiffs sold out the 117 and 175 casks, together making 292 casks or 125 tons of tallow against the defendant, and sent him a letter inclosing a contract of sale, an invoice, and balance-account in respect thereof.

26. On the 22d of June the plaintiffs, having sold out the

last-mentioned parcel of 170 casks or 75 tons of tallow against the defendant, sent him a letter inclosing a contract of sale in respect thereof and a notice that they were ready to deliver 115 casks or 50 tons of tallow to complete the defendant's order of the 28th of April. On the following day the plaintiffs sent the defendant a letter inclosing an invoice and balance-account in respect of the 170 casks.

27. On the 3d of July, 1869, the plaintiffs sent the defendant a letter inclosing an invoice in respect of the last-mentioned parcel of 115 casks or 50 tons; and on the 6th, the defendant not accepting it, the plaintiffs sold out the same against the defendant, and sent him a letter inclosing a contract of sale and invoice in respect thereof, and an account showing a balance of
89] 362*l.* 4*s.* 5*d.* in favor *of the plaintiffs against the defendant in respect of the above mentioned transactions in tallow.

28. The tallow which the plaintiffs gave the defendant notice as aforesaid that they were ready to deliver was purchased by the plaintiffs, as to 50 tons thereof from Brown & Co., on the 17th of March, 1869, as to 30 tons more from Rayner & Co., on the 26th and 28th of April, as to 25 tons from Vaughan Smith & Co., on the 4th of May, and as to 125 tons, residue thereof, from Stenhouse on the 28th of May. The defendant admitted that the tallow so tendered by the plaintiffs was itself in all respects in accordance with the contracts alleged by the plaintiffs to have been made between them and the defendant as aforesaid.

29. At the trial it was proved that there exists an established custom in the London tallow-trade, for brokers, when they receive an order from a principal for the purchase of tallow to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities, at their convenience, at the same time exchanging bought and sold notes with the selling brokers as above described in the present case, and passing to their principals a bought-note for the specific quantity ordered by them, as before described in this case; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the bro-

kers' balance between themselves the purchases and sales so made, and make or receive deliveries to or from their principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other. This custom does not exist at Liverpool, and was unknown to the defendant. The whole of the transactions and dealings in the present case were carried out in accordance with this custom.

30. A verdict was taken for the plaintiffs by consent for *362*l.* 4*s.* 5*d.*, subject to leave reserved to the defendant to move [90 to enter a nonsuit or a verdict, the Court to be at liberty to draw inferences and to amend the pleadings, if necessary, on such terms as the Court should think fit.

31, 32. A rule nisi was accordingly obtained in Hilary Term, 1870, against which cause was shown in Trinity Term; and the Court, after time taken to consider, on the 14th of July, 1870, discharged the rule, Bovill, C.J., and Montague Smith, J., holding that the defendant was bound by the usage of the London tallow-market, notwithstanding he was ignorant of its existence; and Willes and Keating, JJ., holding that, although a usage of the particular market may control the mode of performing a contract therein, it cannot change its intrinsic character, and that, as the authority given by the defendant to the plaintiffs was to buy for him as brokers, and not to sell to him as principals, the defendant was not bound to accept the tallow.(1)

Various letters which had passed between the plaintiff and defendant were set out in the appendix to the case. The substance of these, so far as they are material, sufficiently appears in the judgment of Cleasby, B., post, p. 96.

1871. Nov. 30, Dec. 1. *Cohen* (*Sir John Karslake*, *Q.C.*, with him), for the appellant (the defendant below). The plaintiffs, in buying for the defendant, professed to act as "brokers," and charged him with "brokerage." The defendant dealt with them in their capacity of brokers, knowing nothing of the usage of the London tallow trade, and was entitled to have some

(1) Law Rep. 5 C. P., 646.

one responsible to him as seller other than the plaintiffs, between whom and himself there was privity, and to whom he was to look for the performance of the contract. If it were competent to the plaintiffs to deal as they have done here, the consequence would be that the defendant's remedy upon the contract would be altogether lost in the event of the brokers proving insolvent. A broker is a person employed to exercise his judgment and discretion in dealing for a principal, and one in whom confidence is reposed. He cannot delegate his *trust 91] to another. No custom can sanction a course of dealing which altogether ignores his fiduciary character, and directly affecting the legal relation between the principal and the broker: *Hall* v. *Janson* (1); *Salomons* v. *Pender* (2); *Bostock* v. *Jardine* (3); *Sharman* v. *Brandt.* (4) It may be said that one who chooses to deal in a particular market is impliedly bound by all the usages of that market. That, however, is answered by the remark of Willes, J., in the court below (5), "that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character." The learned judge goes on to say; "It" i.e. the custom, "may regulate as extrinsic what is done in the market, where the contract does not provide otherwise. It cannot overrule what is agreed upon between the parties, whether intrinsic or extrinsic. The agent may perform the business he is engaged for according to the usages of the market in matters of detail, although the principal be unaware of such usage; because every authority to do a thing, not specifying the way, implies authority to do it in a reasonable way, which the usual way primâ facie is. But no usage unknown to the principal can justify a broker in converting himself into a principal seller."

Watkin Williams (*Sir G. Honyman, Q.C.*, with him), contra. The plaintiffs having been employed by the defendant to buy tallow for him in the London market, and having bought tallow within the limits prescribed by the defendant's orders, in a manner which is found to be in accordance with the usages of the particular trade, are entitled to be indemnified against loss. The only objection which can be suggested to the course pur-

(1) 4 E. & B., 500; 24 L. J. (Q.B.), 97.
(2) 3 H. & C., 639; 34 L. J. (Ex.), 95.
(3) 3 H. & C., 700; 34 L. J. (Ex.), 142.
(4) Law Rep. 6 Q. B., 720.
(5) Law Rep. 5 C. P., at p. 656.

sued by the plaintiffs is, that there were no separate and specific contracts for the exact quantities of tallow ordered. But it is found that the dealings were in precise accordance with the usage as stated in the 29th paragraph of the case. There is nothing in this that is at all inconsistent with the plaintiffs' character of brokers. It is nothing more than occurs every day where a merchant abroad buys goods of several persons, 92] shipping them to his correspondent in this country, *and charging a commission on the price paid. It could not matter to the defendant how or from whom the tallow was obtained, provided he gets delivery of that which he instructed the brokers to purchase. The only real question in the case is, whether one who does not know of the existence of the custom can be bound by it. There are, however, numerous authorities to show that, where a man employs a broker to deal for him in a particular market, he impliedly gives him authority to deal according to the usage of that market, and is bound to indemnify him against any loss which may accrue to him from such dealing; and ignorance of the custom affords no excuse: *Sutton* v. *Tatham* (1) *Bayliffe* v. *Butterworth.* (2) The point now before the Court was not raised in *Bostock* v. *Jardine.* (3) There is, it is true, a dictum of Pollock, C.B., which has some bearing on it; but no reasons are given. The judgments of Bovill, C.J., and Montague Smith, J., in the court below are clearly in accordance with all the authorities, and must prevail.

Cohen, in reply, referred to the following authorities:—*Bayliffe* v. *Butterworth* (2) *Sutton* v. *Tatham* (1); *Sweeting* v. *Pearce* (4); *Jenkins* v. *Hutchinson* (5); *Schmaltz* v. *Avery* (6); *Humfrey* v. *Dale* (7); *Collen* v. *Wright* (8); *Bostock* v. *Jardine* (3); Blackburn's Contract of Sale, p. 81.

Cur. adv. vult.

Feb. 12. The Court being divided in opinion, the following judgments were delivered:—

(1) 10 Ad. & E., 27.
(2) 1 Ex. 425; 17 L. J. (Ex.), 78.
(3) 3 H. & C. 700; 34 L. J. (Ex.), 142.
(4) 9 C. B. (N.S.), 534; 30 L. J. (C.P.), 109.
(5) 13 Q. B. 744; 18 L. J. (Q.B.), 274.
(6) 16 Q. B., 655; 20 L. J. (Q.B.), 228.
(7) 7 E. & B., 266; E. B. & E. 1004; 26 L. J. (Q.B.), 137; 27 L. J. (Q.B.), 390.
(8) 7 E. & B., 301; 8 E. & B., 647; 26 L. J. (Q.B.), 147; 27 L. J. (Q.B.), 215.

CLEASBY, B. In this case the plaintiffs seek to recover upon an alleged liability of the defendant to indemnify them against certain losses which the plaintiffs were compelled to make good, upon two contracts for the purchase of 50 tons of tallow and 200 tons of tallow.

93] *It was not denied that the defendant became liable to indemnify the plaintiffs against those losses, if the contracts were entered into for the defendant and according to his instructions: but the defendant alleges that no contract was entered into on his behalf so as to make him liable.

The plaintiffs were tallow-brokers in the City of London, and the defendant was a merchant at Liverpool. It will be sufficient, in what follows, to treat the case as if there was only one contract, for 50 tons, as there is no distinction between them.

On the 2d of April, 1869, the defendant instructed the plaintiffs to purchase for him 50 tons of tallow. There is no doubt that the plaintiffs were employed to make this contract as brokers. This appears from all the correspondence, as well as from brokerage being charged. It must also be taken that the contract was to be made on the London tallow-market, so as to be subject to the regulations or usages of that market relating to such a contract. The plaintiffs, upon receiving the instructions of the defendant, made a contract with certain brokers, Simpson & Co., for the purchase of 150 tons of tallow, intending as stated in par. 12 of the case, to appropriate 50 of the 150 to the defendant's order, and the remaining 100 to another order.

It was customary on the tallow-market for brokers acting for several buyers at the same price to make one contract for the amount of all the purchases. The plaintiffs forwarded to the defendant a regular bought-note of the 50 tons, and to Simpson & Co. a sold-note for the 150 tons. The defendant refused to accept the 50 tons at the time for delivery, and the plaintiffs were obliged to pay Simpson & Co. the difference of price.

The alleged custom of the tallow-trade as to the performance of the contract will be considered hereafter, and also its bearing upon the effect of the contract made by the brokers. But a question was argued before us, whether the manner in which the plaintiffs had made the contract with Simpson & Co. (joining in it the defendant's order with that of another person) was

not such a departure from their duty as brokers, and so much at variance with the defendant's instructions, as to make the contract in no sense the defendant's contract, and so the defendant not responsible. In *the absence of any usage, [94 this would be so. The duty of the broker in general is clear. He is to make a contract for the principal with another person; and there is no such contract, unless there is some other person who has entered into the same contract. But in the present case it is said the contract is made in the manner customary on the tallow-market.

Now, it is not disputed that, if a person authorizes another to bargain for him on a particular market, he authorizes him to contract in the manner usual there, provided the usage is not of such a nature as to alter the employment. A person who holds himself out to act as a broker, and charges a brokerage, cannot set up, as against a person unconnected with the market, and ignorant of its usages, a usage that he should fill a different character from that of broker; but, as to the form and mode of making the contract, and as to the mode of performing the contract when made, the authorities show that the usage is binding. In the present case, the question is, whether the contract made with Simpson & Co. for 150 tons can, taking the usage into account, operate as a contract made on behalf of the defendant, who had only ordered 50 tons to be bought. It rather appears to me that the objection is more to the form and mode of contracting than to the substance.

If the plaintiffs, as soon as the contract with Simpson & Co. was made, had (as it is said they intended to do) really appropriated 50 tons of it to the defendant, and that contract had continued in force until the time for performance, the defendant would have been entitled to the benefit of that appropriation, and would have been entitled (supposing the usage did not make it a distributable contract among the purchasers, so as to entitle each to sue in his own name), to sue in the name of the plaintiffs, and recover damages. There is an apparent difficulty in doing so, because the other persons to whom the residue of the 150 tons was appropriated would also be entitled to sue. But I think the difficulty is not a real one, because the usage is known to and binds Simpson & Co., and, although they only make one contract with the plaintiffs, they know that

the plaintiffs may be contracting for several principals, and 95] assent to that being done. And it would follow *that the principals would be entitled to all the benefits of the contract, and therefore entitled to put it in suit by a special declaration showing the usage, and who each plaintiff was, and how he was entitled to sue upon the contract. The case put is quite a hypothetical one; because the usage does not stop where I have stopped; but, if it did, and each contract of sale remained in force until the time of performance for the benefit of each buyer, I should be disposed to say the buyer could not get rid of the consequence of the contract because other buyers had been included in the same contract.

But, though I should hesitate in coming to the conclusion that, because the contract with Simpson & Co., was made in the form and manner stated, there was no contract between Simpson & Co. and the defendant, yet it appears to me that, when the whole usage is examined, by virtue of which there is said to be such a contract, it will appear that there really never was any contract at all by which the defendant and Simpson & Co. were intended to be mutually bound, and that the alleged contract with Simpson & Co. is a mere form by which the plaintiffs, though apparently acting as brokers, are enabled to be the real sellers.

It is said in par. 12 of the case, that, at the time when the contract for 150 tons with Simpson & Co. was entered into, the plaintiffs intended to appropriate 50 tons to the defendant's contract. But this expression of intention, if it has any meaning, cannot signify a real appropriation; because the transaction was governed by the usage stated in par. 29; and this (which was acted upon afterwards) shows that the purchase from Simpson & Co. was not intended to be appropriated to this any more than to any other contract. It was only to form an item in a tallow account between Simpson & Co. and the plaintiffs. If, before the time when this contract was made, the plaintiffs had contracted to sell Simpson & Co., 150 tons, according to the usage the two contracts would have balanced each other, and neither could have called for any delivery. And so if, after the contract for the 150 tons was made, the price had immediately risen, and the plaintiffs had afterwards made another contract to sell Simpson & Co. 150 tons at an advance of 3d. a cwt., the pre-

tended sale by Simpson & Co. to the plaintiffs would have been in effect cancelled; and all that *would have resulted from [96 it would have been the plaintiff's brokerage and the profit of 3d. a cwt.; and, when the time for delivery came, the plaintiffs would have had to find the 50 tons to deliver to the defendant.

In reality, the custom stated in par. 29 shows conclusively that it was never intended that the contract with Simpson & Co. should be performed by them for the benefit of the defendant, and it cannot therefore in any reasonable sense be considered a contract entered into for his benefit.

In the present case it appears from par. 28 that the plaintiffs were themselves purchasing tallow towards the end of May, for the purpose of performing the contracts made with the defendant: and the result of the custom and course of dealing is this, that, when the time for delivery arrives, the interests of the broker and the principal are directly opposed,—the interest of the principal is that he should be able to sell at as high a price as possible; the interest of the broker, that he should be able to buy at as low a price as possible. In short, the proper character of broker is entirely lost, as it appears to me, in such a transaction. And, when I say that the character of broker is lost in such a transaction, I feel justified in adding that it is lost by the application of a custom which has grown up in disregard, perhaps not thought of or intended, but still in utter disregard of the supreme obligations of good faith.

The correspondence shows throughout that the plaintiffs were dealt with as persons filling an independent position, and qualified to be consulted and to advise. For example, in the letter of the 4th of May, 1869 (B. in the Appendix), written, shortly after the contract was made, by the defendant to the plaintiffs, he refers to the state and prospects of the market, and concludes with the question, "What are your views?" The plaintiffs, in their answer of the 5th of May (C. in the Appendix), explain their views. They begin by regretting the fall of the market, for his sake, and say they cannot see their way into the future. They then go into the state and prospects of the market, and end by indirectly recommending the defendant to make further purchases. Can a custom prevail which is to uphold the plaintiffs, not as independent middlemen, but as the interested ven-

97] dors, and with interests, it *may be the same, but it may be directly opposed to those of the defendant ?

A disposition to uphold the contract actually made may have made me go too far in the opinion that, if the contract made with Simpson & Co., had been in fact really and irrevocably appropriated to the defendant, the customary mode of lumping purchases together in one contract would still have left the defendant the power of resorting indirectly to Simpson & Co., for the fulfillment of their part of the contract. As to this, which may be regarded as the form of the transaction, I can well understand there may be a difference of opinion ; and my own is given with much hesitation. But, as regards the substance of the transaction, I fell strongly, having regard to the position which the plaintiffs occupied in relation to the defendant, as appears both from the correspondence and the nature of the employment, that the contract by which the plaintiffs pretended to be brokers for commission and intended to be themselves vendors, and which beyond a doubt would not be binding, in the absence of a custom, — see *Bostock* v. *Jardine* (1), *Salomons* v. *Pender* (2), — is not made binding by the force of such a custom as I have examined and described.

The result is, that, in my opinion, the rule to enter a verdict for the defendant ought to be made absolute.

Hannen, J. It is an undisputed fact in this case that the plaintiffs were employed by the defendant in the character of brokers to purchase tallow for him. It is not denied that the employment of a broker is an employment as an agent only to buy or sell for his principal of or to another principal, and that it is the duty of the broker to negotiate a valid contract between the two principals. The definition of a broker given by my Brother Blackburn in his work on the Contract of Sale, p. 81, is as follows : — " A broker for sale is a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negotiate and superintend the making of the bargain between them." This is the proper description of a broker for sale throughout the whole commercial world.

It is a further undisputed fact in this case that the plaintiffs,

(1) 3 H. & C., 700; 34 L. J. (Ex.), 142. (2) 3 H. & C., 639; 34 L. J. (Ex.), 95.

*though they sent to the defendant a bought-note in the [98 usual form, representing that they had bought tallow for his account, and charged him brokerage, had not in fact negotiated any contract between him and any other principal, but had themselves in effect bought of other parties and re-sold to the defendant.

It is conceded that, under ordinary circumstances, the plaintiffs could found no claim against the defendant upon this state of facts; but it is contended that the plaintiffs are here entitled to do so, on the ground that, by the custom of the tallow-trade in London, brokers are authorized, in carrying out their employment as agents for their principals, to omit to negotiate any contract between their employer and another principal, and to put themselves in the position of sellers to their principal.

It is found that the defendant was ignorant of the existence of such a custom. Of course, if he had known of the practice, he must be taken to have employed the plaintiffs to act in conformity with it; but, if such a practice be binding on a person ignorant of it, it appears to me to amount to a custom for a broker in the tallow-trade in London to do something entirely inconsistent with the character of a broker, viz., to convert himself from an agent to buy for his employer into a principal to sell to him. This seems to me a violation of very obvious principles; and its true character is only obscured by the accident that the defendant did not in this instance suffer by the plaintiffs' carrying out their employment in the way they did. But an agent is not entitled to depart from his instructions, on the ground that the result has proved equally advantageous to his principal. If this custom is to be upheld, it will be equally binding on a person who may find himself without any other principal to look to, and with only an insolvent broker to be responsible to him.

It is not difficult to conjecture how the vicious practice sought to be justified as a custom has grown up. If a broker is at liberty to buy in large quantities and sell to his principals in small, this doubtless facilitates the earning of his brokerage; and so, the more readily to do this, and to save himself the trouble of negotiating separate contracts, he sacrifices the interest of his principal, which is, to have the security, not merely of the broker, but of another principal.

99] *The case to which this has been likened of a merchant abroad buying of several persons and shipping to his correspondent in this country, charging a fixed commission on the price paid, is not parallel. That is not the business of a broker, but a business of a totally different character, well known as that of a commission merchant. The business of such a merchant is not to negotiate a contract between his correspondent and third persons, and therefore differs from the employment of a broker in the essential point on which, as it seems to me, the determination of this case depends.

For these reasons, I think that the judgment of the Court below should be reversed.

MELLOR, J. (1) I propose to confine my observations on this case to one transaction only, as it raises the question upon which our decision must turn.

The defendant, who is a merchant at Liverpool, on the 2d of April, 1869, instructed the plaintiffs, who are "sworn brokers" carrying on business in London, to buy for him 50 tons of tallow, June delivery, at 46*s.* 6*d.* The plaintiffs, on the same day, by letter informed the defendant that they had succeeded in buying for "his account" 50 tons of tallow, and enclosed in such letter a formal bought-note beginning as follows: "We have this day bought for your account 50 tons nett in casks," &c., and signed "Mollett, Bull, & Unsworth, sworn brokers."

The plaintiffs, who had other orders from other customers, bought several lots of tallow in their own names, with the intention to distribute and appropriate them to their various customers in proportion to their several orders; but there was no sold-note between the plaintiffs and their sellers corresponding to the bought-note sent to the defendant, and no such purchase as therein represented was in fact made by the plaintiffs for the defendant. The 50 tons were not delivered, nor did the sellers deliver any tallow to the plaintiffs; but the practice was, to write it off in a general account between the plaintiffs and their sellers, upon which a balance was struck, and the plaintiffs paid, or allowed, or set off any difference occasioned by the state of the market.

(1) Read by Hannen, J.

*It was admitted, on the argument before us, that the [100 effect of this mode of dealing by the broker was to deprive the defendant of all recourse against the seller in case of non-delivery of the tallow, and throw him entirely upon the responsibility of the broker; and it was further admitted that, unless the custom said to exist in the tallow trade in the London market authorized the plaintiffs to make the contract which they actually made for the defendant, he was not bound by it.

It is clear that the defendant employed the plaintiffs in the character of brokers only; and it was incompetent for them, as it appears to me, to enter into any contract for the defendant the effect of which was to convert themselves into sellers, and thus to deprive the defendant of the responsibility of a principal. The plaintiffs professed to act as brokers only, and in that character charged the defendant with a commission for so acting. A merchant may well trust to the skill and integrity of a broker to make a contract for him with a solvent principal, whilst he may be indisposed to trust to his, the broker's, own solvency.

It was, however, contended that the *universal practice* in the London tallow trade must be taken as incorporated into the authority given by the defendant to the plaintiffs as such brokers. The statement of such custom or practice is to be found in the 29th paragraph of the case; and, if it is to be taken as incorporated into the authority given by the defendant to the plaintiffs, it no doubt authorized them to purchase any quantity of tallow in their own names, making themselves thereby responsible to the sellers, and to appropriate to each of their customers the quantity of tallow necessary to satisfy his individual order.

I quite agree that the custom or practice of a market, thoroughly established, must bind a person who authorizes a broker to make a contract for him, although the custom is in fact unknown to him, so far as it regulates merely what is done in the market, and applies to the mode of the performance of the business for which the broker is engaged. But I think that no usage or custom of a market unknown to the principal, can enable the broker to change his essential character, and become himself the real seller, and deprive his principal of the responsibility of a seller. I have already observed that the principal

101] may have confidence *in the skill and experience of his broker, and yet have none in his solvency.

In the present case, there was no ratification of the broker's authority, and therefore, unless the custom can be read into the original authority, there was no contract binding upon the defendant.

It is said that it cannot matter to the defendant how or from whom the tallow is procured, provided he obtains the delivery of that which he instructed the broker to purchase. That might be so, if in fact the broker was able to insure the delivery of the tallow pursuant to the contract. But the defendant, as it appears to me, was not bound to accept the broker's sole responsibility for such delivery. Had the brokers written to the defendant, and informed him of the custom or practice of the trade in London, it is probable that the defendant would not have objected to have his order placed according to such custom, notwithstanding that it did not give him the responsibility of a seller. But the brokers did not do that, and in fact represented that they had bought on the defendant's account the 50 tons of tallow in question. I think that the true limit of the effect of a practice or custom of a market with respect to such transactions, is that stated by my Brother Willes, in delivering the judgment of himself and Keating, J., in the court below; and I fully concur in that judgment.

I ought to say that the case of *Bostock* v. *Jardine* (1), which was cited by my Brother Willes, and in a measure relied upon as an authority in point, is mis-reported in 3 Hurlstone & Coltman's reports, but appears to be more accurately reported in the 34th volume of the Law Journal. It was tried before me at Liverpool; and I have referred to my notes, and I find that no question was put to the jury, but that I directed a verdict for the plaintiff, giving to the defendants leave to move to enter a verdict for the defendants, or a nonsuit; upon which it appears that the Court of Exchequer granted a rule, which was afterwards discharged; and the case is only an authority for that which was conceded in the argument, viz., that, without the aid of the custom, no contract binding the defendant was made in the present case.

(1) 3 H. & C., 700; 34 L. J. (Ex.), 142.

*I am of opinion that the rule to enter the verdict for [102 the defendant should be made absolute.

BLACKBURN, J. This was an appeal from the judgment of the Court of Common Pleas, which was argued in the sittings after last Trinity Term, before the Lord Chief Baron and my Brothers Channell, Mellor, Hannen, Cleasby, and myself.

At the trial the verdict was entered for the plaintiffs, subject to leave to move on grounds which we must take to be accurately set forth in the case before us. A rule was granted in the Common Pleas, on the argument of which it appeared that Bovill, C.J., and Montague Smith, J., were of opinion that the rule should be discharged, and Willes, J., and Keating, J., were of opinion that the rule should be made absolute. The Court below being thus equally divided in opinion, no judgment was pronounced, but the rule was discharged and the verdict stood; and now the question is brought before this Court on appeal. The opinions of the judges below are reported in Law Rep., 5 C. P., 646.

After a good deal of consideration, I have come to the conclusion that the verdict found for the plaintiffs is right, and should not be disturbed.

The great question in this case is, whether the orders given by the defendant to the plaintiffs to buy tallow for him are to be understood as incorporating the customary terms, and so as to give the plaintiffs authority to act in the manner which the jury have found to be the established custom of brokers in the London tallow-trade. We in the Court of appeal must act on this finding as true, and treat those as being really the customary terms. If the orders are to be understood as incorporating these customary terms, the plaintiffs have pursued their authority: And there is no difficulty as to the pleadings; for, I apprehend that, where a person acting at the request of and in pursuance of an authority given by another has incurred a liability, and has in consequence been before action obliged to pay money in discharge of that liability, he is entitled to have that money repaid to him; and the count for money paid is a proper count under which to recover it: *Brittain* v. *Lloyd* (1).

(1) 14 M. & W., 762.

103] *The orders are set out in the 8th and 9th paragraphs of the case. They are not requests to the plaintiffs to sell tallow to the defendant, but are expressed to be orders to the plaintiffs to buy tallow for the defendant; and a discretion is given to the plaintiffs to fix the price, which would be quite inconsistent with the plaintiffs being themselves the vendors. Those orders were given to the plaintiffs in their character of brokers; and they expressly call themselves brokers when acting in pursuance of their orders; and they charge commission as brokers. I do not attach so much weight to the use of the word "broker;" but I think that the discretion as to the price and the charge of commission are conclusive to show that the orders were given to the plaintiffs intending them to act, not as principals, but as agents for the defendant, and middlemen and negotiators, .which is the thing which is meant by the word broker. Primâ facie, the legal effect of accepting such orders is, that the plaintiffs were employed by the defendant on the terms that they should perform all the ordinary duties of brokers, and have all the ordinary authority of a broker. But this is only primâ facie. The terms on which the parties deal may be varied so as to impose on the brokers duties and liabilities, and give them powers beyond those which would be implied by law from the employment; or so as to relieve them from some of the duties which would be otherwise imposed on them. And this may be either by express agreement between the parties or by the force of a custom of a particular trade tacitly incorporated as part of their agreement: for, if it is perfectly well known that those engaged in a particular trade are always understood to deal on certain terms; the employment, unless there is something to show the contrary, is to be taken to be by the agreement of the parties on the customary terms, though they were not expressed. This is in conformity with the maxim, "In contractibus tacitè insunt ea quæ sunt moris et consuetudinis. Pothier, in his Traitè des Obligations, partie 1, sect. 1, art. 7, § 95 (tom. 1, p. 52, Dupin's edition, 1827), expresses this same rule thus,—"On sousentend dans un contrat les clauses qui y sont d'usage quoiqu'elles ne soient pas exprimées." And this tacit variation of the terms from those which would otherwise be implied by law, has the same effect as if it was express.
104] The great question in the present case is, *whether there

is enough to show that the customary terms are not to be tacitly incorporated.

In the judgment of my Brothers Willes and Keating below, it is said to be "an elementary proposition that a custom of trade may control the mode of performance of a contract, but *cannot change its intrinsic character.*" To some extent I agree with this. If the terms are such as to be inconsistent with the nature of the employment, so that, if they prevailed, they would change its nature altogether, I think they should be rejected. In such a case, if the employment and the terms were expressed at full length beside each other, there would be an apparent contradiction and incongruity: as, for instance, if an order was given thus,—"Act for me as my agent to buy for me, and receive commission from me for your services as such agent, on the terms that you are neither to have the powers nor perform the services nor be subject to the liabilities of an agent, but shall be subject to the liabilities and have the rights of a vendor," there would be a patent contradiction on the face of the order. If this was all expressed, it would be a question of construction whether the order was to be considered void for uncertainty, or whether the expressed terms were to prevail though the effect would be that the relation between the parties would not be that of principal and agent at all.

The duty of the Court is to construe ut res magis valeat, and therefore generally in the construction the expressed terms would prevail, though that would have the effect of making the real relation different from the nominal one. But, if those terms could only be brought in, because, being the customary terms, they were to be tacitly understood, I think it would be different. The maxim "Expressum facit cessare tacitum" would then apply; and, if the order expressed that the employment was to be that of an agent, and the customary terms, if incorporated, would make it not that of an agent at all, the expressed employment would prevail over the tacit terms, and cause them to be rejected as inconsistent with and repugnant to the express employment.

To make my meaning plainer, I will put a case of a trade such as that of a jobber, who sells to any one who comes to him at a fraction above the market price, and buys of any one at a fraction *below the market price. If such a person re- [105

ceived an order expressed as if he were for commission to act as an agent to buy for his correspondent, he ought, unless he were willing to act as an agent, to reject it, informing his correspondent of his mistake, and that he was not an agent, but a jobber; for, I think, that, if he accepted the order thus expressed, he would incur the liabilities of an agent, however well known it might be that he was a jobber, and that jobbers did not incur such liabilities: and I think this would be so even though the fraction which as a jobber he would receive were in amount the same as the commission which as agent he would receive.

If this is all that is meant by the passage I have cited from my Brother Willes's judgment, I agree with it, though I differ as to its application to the present case.

I have already expressed my opinion that the orders clearly express an intention that the plaintiffs should buy for the defendant, acting as his agents, and receiving pay for their services as such; and, if I thought that the effect of tacitly incorporating in the orders the custom set out in par. 29 of the case would be to change the relation between the parties from that of principal and agent to that of buyer and seller, so as to deprive the defendant of the services of the plaintiffs, for which he pays commission; and more particularly, if I thought the effect of the custom was to put the duty which the plaintiffs would owe to the defendant to obtain for him as good a bargain as was practicable, in conflict with their interest; I should, as at present advised, think that the customary terms must be rejected, as excluded by the terms of the employment.

I have thought it right to say so, though it is not necessary, in the view I take of the case, to decide this; for, I come to the conclusion that the custom is perfectly consistent with the employment of the plaintiffs as brokers to buy for the defendant, and leaves the plaintiffs under liabilities to the defendant for the due performance of services, quite sufficient to be a consideration for the commission, though the effect of the custom is materially to vary both the duty and the authority of the plaintiffs from that which would be implied by law if no such custom were incorporated.

106] *In this I take a different view of the facts from that which seems to have been taken by my Brothers Willes and

Keating in the court below. It is, therefore, necessary to examine what the facts of the case are.

The order of the 2d of April was, to buy for the defendant 50 tons for the June delivery. On that day, it appears in the 8th paragraph, the plaintiffs sent the defendant a formal bought-note for 50 tons, setting out all the terms of the contract, and signed by the plaintiffs as brokers. In par. 12 it is stated that, on receiving the defendant's order of the 2d of April, the plaintiffs entered into a contract with W. W. Simpson & Co., for the purchase of 150 tons of tallow, intending to appropriate 50 out of these 150 tons to the defendant's order, and 100 to another order which the plaintiffs had received from another person: and the plaintiffs sent a sold-note to Simpson & Co., for 150 tons of tallow, in all respects corresponding with the note sent to the defendant, except in the quantity. It is this variance in the quantity that raises the first difficulty; and I agree that, but for the custom, it would be fatal. But what at present I wish to point out is, that there was no breach of the fiduciary relation between the parties, nor anything inconsistent with the employment which the plaintiffs had accepted, to buy for the defendant as cheap as they could, and the duty which I think is in consequence thrown upon those who accept such an employment, not to set their interest in conflict with their duty, as they would do if they were to make themselves the principals who would profit if the price were higher. Had the plaintiffs obtained the consent of Simpson & Co., to divide the contract, and delivered to them two sold-notes, one for 50 tons and the other for 100 tons, the transaction would have been all regular and binding, without the aid of any custom at all. The plaintiffs had not in the least degree more interest in the transaction because the contract was not divided; they would have been liable for the fulfillment of the contract as brokers who did not disclose the name of their principal, as much in the one case as in the other; and in neither case was their personal interest put in conflict with their duty to their employers.

The manner in which the order of the 28th of April, was acted upon is stated in paragraphs 9 and 13. It differs in this that *there were two sold-notes for *smaller* quantities than [107 the one bought-note; but in other respects it was similar. In this case also there was no breach of the duty imposed by the

fiduciary relation between the parties. I am the more anxious to point out this, because, as I have already intimated, I should, as at present advised, give judgment for the defendant, if I did not think that this was the fact. But, though there was not any breach of this fiduciary relation, there was an important departure from the ordinary duty of a broker.

The ordinary duty of a broker is, to make a contract between his employer and some other person: and, though the broker may, in consideration of a del credere commission,—see *Coutourier* v. *Hastie* (1), or, according to the custom of particular trades, in consideration of his not being called upon to disclose the name of his principal,—see *Cropper* v. *Cook* (2); *Fleet* v. *Murton* (3),—incur personal liability to see that the contract is performed; yet the employer has a right to have the liability of the other person as well; and this is an important matter.

In the present case, Simpson & Co. have failed, whilst the brokers (the plaintiffs) have remained solvent, and so the liability of the contractor is not of consequence; but it might very well have been that Simpson & Co. had remained solvent and the brokers failed. Then the importance of having a contractor bound to the defendant would have been obvious, as is well pointed out by Willes, J. (4); and this is an important difference. The person who employs a broker on the terms that the broker is to make a contract for him with another, relies on the skill and intelligence of the broker who is to select his contractor, and who will choose a solvent one; but he has no occasion to inquire whether the broker has enough capital to meet the contract. Even where the name of the contractor is not disclosed, and the broker is personally liable, it is a great security to have in addition the liability of a contractor who, though not named, is, if the broker has done his duty, a person of repute, such as a broker might reasonably trust.

Now, in the present case, there is no contract between the de-
108] fendant *and Simpson & Co. The defendant could not call upon Simpson & Co. to deliver him 60 tons of tallow under the contract of the 2d of April, because Simpson & Co. had not engaged to deliver any smaller quantity than 150 tons. Nor could Simpson & Co., if willing to deliver the smaller quantity

(1) 8 Ex., 40; 22 L. J. (Ex.), 97.
(2) Law Rep., 3 C. P., 194.
(3) Law Rep., 7 Q. B., 126.
(4) Law Rep., 6 C. P., at p. 656.

of 50 tons, compel the defendant to accept them, because, if they had been unwilling sellers, the defendant could not have forced them to deliver him that smaller quantity: see *Thornton* v. *Charles* (1); and I cannot think that the difficulty is cured by any equity entitling the now defendant to use the plaintiffs' name and sue upon the contract pro tanto for himself. All this difficulty would have been avoided, if two sold-notes, one for 50 tons and one for 100 tons, had been delivered to Simpson & Co., instead of one for 150 tons. But the custom, it is expressly found, is, to dispense with doing so; and the case of *Thornton* v. *Charles* (1) leads me to infer that the practice is not of recent date.

I can understand that the dividing of a lot may necessitate some negotiation and trouble, so as sometimes to cause a bargain to be lost which would be made if the whole lot were taken at once. Possibly even the objection to dividing a lot may be one only to be overcome by a fraction of rise in the price; and therefore I can easily imagine reasons why the broker engaged in such a business should desire to have every facility for purchasing entire lots, though the quantity may not precisely correspond with that specified in the order of any of his constituents. And I can also understand why the constituent should be willing to give every facility for uniting his order with those of others, or splitting his order into different parts, if thereby it can be executed more promptly or on more favorable terms. I am not, therefore, at all surprised at a custom having sprung up, with the object of enabling the broker to make his contracts more promptly and more cheaply than he could do, if obliged to make his contracts for the precise quantity in his orders. I should have thought beforehand that those objects might have been carried out without losing the advantages derived from the personal responsibility of the principals to each other. For instance, I should have thought that the plaintiffs *might [109 have delivered to Simpson & Co. on the 2d of April two sold-notes, one for 50 tons and the other for 100 tons, instead of one note for 150 tons, and on the 28th of April have delivered to the defendant two bought-notes, one for 150 tons and one for 50 tons, instead of one for 200 tons; and to Messrs. Rayner two sold-notes, one for 50 tons and one for 150 tons, instead of one

(1) 9 M. & W., 802.

for 200 tons, without any objection on their parts, and with a very little additional trouble.

But no one not personally conversant with a business can tell what little things are found in practice to be important. The custom, which was proved to the satisfaction of a London jury and of the judge who tried the case, is stated in par. 29 of the case; and by that it appears that in this trade it is an established custom for the brokers who have received an order from a principal for the purchase of tallow "to include such order with others they have received in a contract for the entire quantity, or in any quantities at their convenience, at the same time exchanging bought and sold notes with the brokers, as above described in the present case, and passing to their principals a bought-note for the specific quantity ordered by them." And I cannot construe this as having any other meaning than that the custom is, not to require the broker to take care that privity of contract is established between the broker's client and the person who makes the contract with the broker into which he enters in consequence of his client's order. I am not able to see any inconsistency between this modification of the broker's duty and his employment as a broker. The employment would be on the terms that the broker, in consideration of his employment for commission, should use reasonable [illegible] and diligence to purchase the goods as cheaply as he could [illegible] his client's limits, and to charge the client only [illegible] commission in addition to the price actually [illegible] as necessary result of these duties that the broker should not himself have any interest in selling the goods, or as to put his duty to obtain the goods cheap in conflict with [illegible] interest and duties. By the custom, that, if he [illegible] the name of the person with whom he made [illegible] he should be himself personally liable for its fulfilment, [illegible] broker would be. In the ordinary [illegible] of the employment of a broker, there would be this [illegible] that he should use reasonable skill and care to establish a binding contract between his client and the other contracting [illegible] the matter terms untouched, but [illegible]

[illegible] how this decision is inconsistent with the [illegible] how it can, to adopt

the language of Willes, J., be said in any way to change the intrinsic character of that employment. Let us suppose, to test it, that the whole were written out, and that the constituent of the broker wrote as follows,—"Act for me as my broker, in buying the tallow on as good terms as practicable, and for that purpose you may establish privity of contract between me and the person who engages to supply it, as ordinary brokers do; But, as I am told that it is found by experience that a broker can more speedily and perhaps more cheaply pick up tallow when able to take an entire lot from another broker than when obliged to make a contract for the specific quantity contained in the client's order, and, as, it would seem, it is found in practice inconvenient to effectuate a contract for an entire lot by the delivery of several sold-notes, containing each the quantity bought for each different client, and amounting in the aggregate to the quantity contained in the lot, without which no privity of contract can be established, and in consequence it appears that my order may be placed more quickly, and perhaps more cheaply, if I will dispense with the necessity for establishing privity of contract between me and the other contractor; for these reasons, I give you an alternative authority to dispense with establishing privity of contract between me and the other contractor, provided you are personally liable to me for the fulfillment of the contract, and there really is a contract made by you which you can enforce, entered into in consequence of my order, and so fixing the price, and preventing your interest from coming in conflict with your duty to me; in every other respect, you are to have the authority and liability of a broker." Such a variation of the terms would be in no way inconsistent with the relation between the parties being that of broker and client. The custom stated in the 29th paragraph, as I read it, does no more than add as one of the terms of the broker's employment an alternative power to the effect I have just stated. It *seems to me in no way inconsistent with the employ- [111
ment as broker, and therefore not objectionable on that ground.

The case of *Bostock* v. *Jardine* (1) was referred to in the Court below and in the argument before us as a decision that such a custom was bad in law; and, as reported, it certainly seems so; for, it is there stated that the question was left to the jury, who

(1) 3 H. & C., 700; 34 L. J. (Ex.), 142.

found that there was such a custom, and yet the Court entered judgment for the defendant: but the case is misreported in this respect. My Brother Mellor, before whom the cause was tried, has referred to his notes, and finds that no question was left to the jury, the case being treated as one of law for the Court only.

The defendant is stated to be a Liverpool merchant, and personally ignorant of this custom. But I think it is now thoroughly established that a person who deals in a general market is bound to inquire what its usages are; and that those who deal with him have a right to hold him bound by them to the same extent as they would have been entitled to hold a person bound who belonged to the place. He is precluded from setting up, as against the persons he dealt with, his ignorance of that which he ought to have known. I refrain from discussing this at length, because I do not understand that any of the judges either in the court below or above doubt that the defendant is in no better position because he was a Liverpool man, who chose to deal in London, than if he had been a Londoner.

These are the reasons which lead me to the conclusion that, when the plaintiffs on the 2d of April entered into a contract with Simpson & Co., for 150 tons, making themselves liable to take and pay for them, they did, as far as regarded 50 tons, incur that liability at the request of and in pursuance of the authority given by the defendant in his order of that date, which is one part of the plaintiffs' case. It remains to be seen whether, in consequence of that liability, the plaintiffs have been compelled to pay money, and whether all conditions precedent to the defendant's obligation to pay that money have been fulfilled. I think both positions are made out.

I quite agree that the plaintiffs cannot call upon the defendant to pay them, unless they can show that he might have had the
112] *tallow he had stipulated for, on payment of the price. It was argued at the bar that this was not so, because the specific casks of tallow which were offered to the defendant were never the property of Simpson & Co.; and this, no doubt, is true in fact. But I am not able to see anything which entitled the defendants to insist on having tallow that had belonged to the persons whom the plaintiffs described in the bought-note as principals from whom they bought. Supposing that there had been a sold-note for 50 tons delivered to Simpson & Co., so as

to establish privity of contract between that firm and the defendant, I apprehend that Simpson & Co., if that firm continued solvent, or its trustees if it failed, might have supplied the defendant when the right time came with any tallow answering the description in the contract, however or wherever obtained; and that the defendant could not have refused to receive that tallow, provided it did answer that description.

I have known cases in which the party who had contracted to supply goods had failed before the time of delivery, and could not himself on his own credit have procured such goods, but, the market having gone down, so that the bargain was a good one, he or his creditors have gone into the market and agreed with a third party to supply the goods on his behalf, receiving the contract price, and out of that retaining the price at which the third party was willing to furnish the goods, handing to the contractors or his creditors the surplus. I have always, when at the bar, considered that such a course was legitimate. I think that since I have been on the bench I have so ruled, though of that I cannot be sure; and I never heard that either a judge or a jury took an opposite view of such a transaction. The defendant, if the goods are of the description stipulated for, gets all he bargained for: and, why should he be entitled to make a dishonest profit on account of the failure of the contractor? And (still assuming, contrary to the fact in the present case, that there was privity of contract), if the person who was to supply the goods to the broker's constituent A. had chanced to have made a contract through the same broker to receive similar goods at a lower price from a constituent B., I can conceive no reason why he should not say to the broker, "Apply the goods which your constituent B. *is to supply to me at so much a ton to [113 the fulfillment of the contract by which I am bound to supply to your constituent A. at so much more a ton, and apply the money you pay on behalf of A. in the first instance in paying B., and hand over to me only the surplus." This is called in the case setting off one contract against another, and it was treated on the argument as something abnormal, and which it would require a custom to justify. But it struck me on the argument that it would be quite fair and proper, and required no custom at all to justify it. I asked what harm it would do to A. if his contract was fulfilled by means of this which is called a set-off;

how he was prejudiced by receiving all that he had bargained for by means of this or any other machinery that was convenient to the other side. No answer was given; and, after turning it over in my mind, I can see none that could have been given.

If, indeed, there should be any dispute as to the quality of the tallow offered, the broker who was acting in the case supposed for both A., who is to receive the tallow, and whose interest is to have it extra good, and B., who is to supply it, and whose interest is therefore to pass tallow that was of as low a quality as would comply with the contract, could not well act as arbiter or judge as to the quality of the tallow; but this is a small matter, and no difficulty of that sort has arisen here.

It seems to me that the effect of the transaction which is called balancing and settling the contracts against each other was simply this, that Simpson & Co., or their trustees said to the plaintiffs, "Apply all the tallow which you are bound to supply to us, as far as it will go, to the fulfillment of those contracts by which we are bound to supply you tallow on the same terms; as to the balance of the contracts, get tallow where you can to fulfill them, on the best terms you can; charge us with the market-price and pay us the difference between that and the contract-price." The plaintiffs assented to this. It is stated in the case that it is the custom so to do, which certainly tends to show that it is convenient; and perhaps, therefore, the plaintiffs were bound to do so. But I have failed to see what objection there would have been to their voluntarily adopting this course, without custom at all, even if there had been complete
1·14] privity of contract established between *the defendant and Simpson & Co.; nor can I see how the defendant is in any way prejudiced by this course being followed. If the plaintiffs had by any means escaped paying the difference to Simpson & Co., and were seeking to make a profit out of the transaction, it would in my opinion have been quite a different case.

I have had the advantage of reading my Brother Cleasby's opinion; and I wish to point out where are the two matters in which I differ from what I understand to be his reasoning.

In the first place, I understand the statement in par. 12 of the case, that, "on receiving the defendant's order of the 2d of April, the plaintiffs entered into a contract with Simpson & Co.

for the purchase of 150 tons of tallow, intending to appropriate 50 tons out of these 150 tons to the defendant's said order," as amounting to a finding that the plaintiffs made this contract with Simpson & Co. in consequence of the defendant's order, and in intended pursuance of his authority and (if the custom is effectual) in real pursuance of his authority. I quite agree that it had not and was not intended to have the effect of establishing privity of contract between the defendant and Simpson & Co. And the same remarks apply to the second order. Secondly, that the contracts actually entered into were not for the sale of specific casks of tallow, or for the supply of tallow from a particular stock, or supplied by a particular firm whose brand might be of importance; but are contracts to supply any tallow answering a particular description; and consequently the defendant was offered all that he had ever stipulated for, and suffered no prejudice from the tallow being obtained elsewhere than from Simpson & Co.'s own stores.

For these reasons, I think the judgment of the Court below should be affirmed.

CHANNELL, B. In this case I am of opinion that the rule nisi granted by the Court below ought to have been discharged, and that the judgment entered pro formâ to that effect (the Court having been equally divided) ought to be affirmed.

I have had the opportunity of reading the judgment of my Brother Blackburn, who has gone into the case very fully. I *agree generally with him; but, considering the difference [115 of opinion amongst the judges here as well as in the court below, I think it right to state shortly the grounds of my judgment.

We must take it that the custom set out in par. 29 of this appeal case was fully proved, and that the mode of dealing there described is the mode according to which business is done by the persons calling themselves brokers, in a market which we must take to be a known and established market, and which is called in the case "the London tallow-trade." The plaintiffs are persons acting as such brokers in that market, and dealing according to its usages. The defendant is a Liverpool merchant, not perhaps cognizant of the usages of the London tallow-market, but who chooses to employ the plaintiffs to buy tallow

for him at that market. If he distinctly and expressly employed the plaintiffs to buy for him according to the usages of that market, the plaintiffs would clearly be entitled to recover in this action; for, according to the findings in this case, they have dealt in the matter throughout according to the usages. He has not, however, expressly employed them to buy according to the usages; and the question we have to decide, as it seems to me, is simply whether the actual employment of the plaintiffs by the defendant under the circumstances stated in the case is to be taken as the same as if he had expressly employed them to buy according to the usages.

The market being a known and established one, it becomes immaterial whether the defendant was aware of the usages or not. By choosing to deal or employ others to deal for him in such a market, where he might expect to find special usages, he became not necessarily bound by all the usages of the market,—that would depend upon the nature of the dealing,—but as much bound by them if he did not know them as if he did. This, I think, has been held in numerous cases; and I do not know that there is any difference of opinion in the Court upon the point. It was in fact his duty, before dealing or employing others to deal in such a market, to inquire as to its usages, if he wished to provide against anything which he had not foreseen being done in pursuance of the contract. We may, therefore, disregard the element introduced into the case by the defendant's ignorance of the usage.

116] *The question, therefore, comes to this, was there anything in the express terms of the employment of the plaintiffs by the defendant so inconsistent with the usage, that the usage is to be taken to be excluded and not tacitly incorporated. The well-known rule that a usage varying a contract cannot be incorporated into it, is merely an example of the maxim "Expressum facit cessare tacitum." I can see nothing in the orders given by the defendant to the plaintiffs in this case to show that what they were employed to do was so inconsistent with the course of dealing according to the usage, that it must be taken that the plaintiffs were not authorized to follow the usage.

It seems to me that it is begging the whole question to say that the plaintiffs were employed to act as brokers, if by that is meant, to act as ordinary brokers only. They were employed

to "buy for me." It is true that they were not asked to "sell to me:" and, if I thought that the effect of the usage was necessarily to make the plaintiffs sellers to the defendant, I should say it was inconsistent with the employment. I do not, however, think that is the effect of the usage. The order is, "buy for me" simply (in one case, "buy for me on the best terms"). It is not "buy for me as an ordinary broker does," that is to say, "make a binding contract of sale and purchase between me and some third person." It is simply "buy for me;" and that, being addressed to a broker in the London tallow-trade, means "buy for me in the way a broker in the London tallow-trade does;" and that, again, by virtue of the usage means, "buy for my benefit in your own name; hand to me the goods when you get them; get them as cheaply as you can in the market; I will pay you the price you have to pay to the seller, and will pay you brokerage for your services." I can see nothing in such a mode of buying for another so inconsistent with a simple direction to buy as to prevent our construing as a direction to buy in that manner a simple direction to "buy for me," when addressed to a person who usually, and to the knowledge of the person giving the direction, buys for others in that manner,

I have already pointed out that, the usage being the usage of a known market, actual knowledge of it is immaterial. There is, in fact, nothing whatever to show any intention on the part of the *defendant to direct the plaintiffs to buy in any [117 other manner than that in which they were accustomed to buy, and in which they did buy.

It seems to me, therefore, that the orders given by the defendant to the plaintiffs must be construed as if they had been, in express terms, "Buy for me according to the usages of the London tallow-market;" and consequently that the plaintiffs, having bought for him according to those usages, and having incurred liability at the defendant's request by so doing, are entitled to be reimbursed.

For these reasons, I think the judgment should be affirmed.

KELLY, C.B. I am of opinion that the judgment in this case should be affirmed.

The plaintiffs are brokers in the City of London, and on the 2d of April, 1870, effected a purchase on behalf of the defend-

ant of 50 tons, and on the 28th of April next following of 150 tons of tallow, and delivered to him notes of the purchases in the usual form, not naming the sellers. The plaintiffs, with a view to the execution of the defendant's orders, purchased the whole quantity, at various periods, of Simpson & Co., and of Rayner & Co.; not under two several contracts for 50 and 150 tons, but, having received orders from other buyers to purchase other quantities of the same tallow, made purchases of 150 tons and 200 tons respectively. When the time arrived for the delivery of the tallow, Simpson & Co. had failed, and the plaintiffs, having contracted with them for several other purchases and sales of tallow before the time for performance, settled the whole of these transactions by setting off the sales against the purchases, and paying or receiving the difference upon the whole of the contract. The plaintiffs then, when the time had arrived for the delivery of the tallow to the defendant, having purchased the requisite quantities, tendered the tallow in due time to the defendant; when, tallow having fallen in price, and the defendant having ascertained that the tender was made by the plaintiffs, and not by Simpson & Co., and Rayner & Co., the sellers, he repudiated the contracts, and refused to accept the tallow; whereupon the plaintiffs brought this action to recover 362*l.* 4*s.* 5*d.*, the loss or difference in price which they had allowed to
118] Simpson & Co., *and Rayner & Co. And the question is, whether they are entitled to recover.

The defendant contends that, by reason of the purchase by the plaintiffs of the tallow in different quantities from those which he had ordered, he would have had no right of action against the sellers if they had failed to perform the contracts, and that there was in fact no privity between him and them; and that, the plaintiffs not having effected these purchases according to the duty and practice of brokers, he is not bound by the contracts entered into, and which are not such as he authorized the plaintiffs to make; and therefore that the plaintiffs cannot maintain this action.

The plaintiffs, however, rely upon the usage in the tallow trade in the City of London, to the effect that a broker, upon an order to purchase tallow as in the present case, is entitled to contract for the purchase of the quantity required, together with other quantities for which he may have received orders

from other parties, including the whole in one and the same contract of purchase; and, further, that he may settle with the sellers as before mentioned, and then enforce the performance of the contract with the purchaser, suing in his own name; he, however, being always personally liable under the usage for the performance of the contract with the buyer, as if he had himself been the seller of the tallow.

The question for our consideration is, whether this usage is binding upon the defendant, who is a merchant residing and trading at Liverpool, and not in London, and whether it is a reasonable custom and so incorporated into the contract as to be binding on the defendant, and to enable the plaintiffs to recover.

The custom itself, as above set forth, is expressly found by the case; and the plaintiffs are found to have strictly conformed to the custom throughout these transactions; and I am of opinion that the custom is lawful and reasonable, and also that it is binding upon the defendant. It is true that this custom, as found, does not enable the defendant to enforce the performance of the contract by an action in his own name against the seller; but, inasmuch as it may well be that, from the nature of the tallow trade, a broker may be often unable to effect a purchase of the specific quantity of tallow, neither more nor less, that a buyer may require, or to *purchase it on terms as [119 favorable to the buyer as upon the purchase of a larger quantity, I see nothing unreasonable in a custom which enables him, if he has several orders to buy for different purchasers, to execute them by purchasing of a seller a sufficient quantity to provide for the performance of all the contracts; he being himself, by force of the custom, personally liable to each of the buyers for the complete performance of each of the contracts.

It is objected that the purchaser, in such a case, if the broker becomes insolvent, being without the means of enforcing the contract against the seller, is deprived of the benefit of it altogether. But I think that the disadvantage to the defendant of being unable to sue the solvent seller, upon the insolvency of the broker, is rather apparent than real; for, if such had been the state of things in this case, and supposing the price of tallow to have risen, in which case only the defendant could have been interested in suing Simpson & Co., I am of opinion that

he might have sued in the name of the plaintiffs, and the value of the 150 tons of tallow would have been recovered by the plaintiffs, or in their name, in trust for the defendant as to the 50 tons, and for the purchaser of the 100 tons as to the remainder. And, if the defendant's order and the plaintiffs' note of the contract had been so expanded as to embrace all these contingencies and to provide for them, there would have been no departure from the real intention of the parties, either as to the contract itself or the mode of carrying it into effect.

The direct operation of a custom upon any contract, and indeed the very essence of a custom, inasmuch as it is supposed to be known to both parties, is, to make it as much a part of the contract itself as if it had been expressly recited or stated in it. If the contract here to all that it contains had added the words hereafter following, it appears to me that the contract would have been reasonable and just to all parties, and that which, if the parties knew of the custom, they must actually have intended,—"It is hereby agreed that the broker may purchase of the seller any larger quantity of tallow than 50 tons, in order to supply other contracting parties; provided that the buyer shall, if he thinks fit, be at liberty to sue the seller in the name 120] of the broker, and *that the broker hereby guarantees the performance of the contract by the seller."

As to the objection that the broker in fact becomes the seller, I need say no more than that he becomes so only to the same extent as in the common case of a broker guaranteeing the performance of the contract by the seller. If all parties remain solvent, no difficulty arises. If the broker becomes insolvent, the remedy above pointed out is open to the buyer. If the seller be insolvent, as here, the broker must perform the contract with the buyer. Why should the buyer in either case escape the performance of the contract as against the one party or the other?

So, I think that the defendant, upon authority as well as on principle, although carrying on business at Liverpool, must be taken to have known, or, if not, that he must be content to be bound by the custom of the tallow-trade in London, if he think fit to instruct a broker there to effect a purchase on his behalf. The custom in London is universal; and a broker, as before observed, would be often unable to comply with an order to

purchase, or to effect the contract on terms equally favorable to the buyer, unless by availing himself of the custom. And, having done so in the transaction in question, I am of opinion that he is justified by the custom, which, being reasonable in itself and binding upon the defendant, entitles the plaintiffs to maintain this action.

The Court being thus equally divided, the judgment of the Court below discharging the rule, was affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorneys for defendant: *Simpson & Cullingford.*

Feb. 9, 1872.

*Lee and others v. Walker. [121

Law Reports, 7 Common Pleas, 121.

Negligence — Practice as to obtaining Letters-Patent.

On the 28th of April, 1870, the plaintiffs retained the defendant, a patent-agent, to obtain for them letters-patent for "A new automaton vase or depôt for holding coals," and on the 30th a provisional specification was filed. Nothing more was done by the defendant until the end of August, when he gave notice of his intention to proceed with the patent, pursuant to s. 12 of 15 & 16 Vict. c. 83; and in October he applied for the fiat of the Attorney-General for sealing the patent.

In the meantime, viz: on the 15th of June, 1870, one P. had, as the defendant was aware, filed a provisional specification for "Improvements in coal vases," which turned out to be substantially the same as the plaintiffs' invention, and had on the 10th of September obtained a grant of letters-patent for the same.

The Attorney-General rejected the plaintiffs' application, upon the authority of *Ex parte Bates* (Law Rep. 4 Ch. 577), where under similar circumstances the second applicant for provisional protection, in the absence of fraud, was held entitled to have his letters-patent sealed, of which decision, though pronounced in May, 1869, the defendant was ignorant.

Held, that there was evidence of negligence on the part of the defendant.

The first count of the declaration stated that, in consideration that the plaintiffs would employ the defendant, as and being a patent-agent, as their agent to procure in the name of Absolom

Evans certain letters-patent for an invention of "A new automaton vase or depôt for holding coals or other substances," for reward to the defendant, the defendant promised the plaintiffs that he would use due and proper care and skill in and about endeavoring to procure the said letters-patent; that the plaintiffs, relying on the promise of the defendant, did employ the defendant as aforesaid, and on the terms aforesaid; and that all times elapsed necessary to entitle the plaintiffs to have the defendant do what he promised to do, and to sue him for the breach thereinafter mentioned; yet that the defendant did not use due and proper care and skill in and about endeavoring to procure the said letters-patent, but so carelessly and negligently conducted himself in endeavoring to procure the same that he failed to procure them; whereby the plaintiffs, to whom Evans had agreed to assign the benefit of the invention and of the letters-patent when obtained, lost all the profits and benefit which would have accrued to them from the said letters-patent, &c.

122] *Third count, for money received by the defendant to the plaintiff's use, and money found due upon accounts stated.

Pleas: 1. To the first count, a denial of the promise; 2. To the same, that the defendant did use due and proper care and skill in and about the endeavoring to procure the letters-patent, and did not carelessly or negligently conduct himself in endeavoring to procure the same; 4. To the last count, never indebted. Issue.

At the trial before Lush, J., at the Staffordshire Summer Assizes the facts proved were as follows:— One Evans, who was in the employ of the plaintiffs, japanners and tin-plate workers at Wolverhampton, having invented a new automaton vase for holding coals, and having agreed to assign the benefit of the invention to the plaintiffs, they, on the 28th of April, 1870, employed the defendant, a patent-agent, to take the necessary steps for patenting the invention. Accordingly a provisional specification was prepared and filed by him on the 30th of April, 1870. On the 9th of August the plaintiffs received a letter from the defendant, reminding them that the time was drawing near for giving notice to proceed (1), and requesting them to forward him 10*l.* on account of duties (which they did).

(1) Notice of intention to proceed with the patent must be given within four months from the filing of the provisional specification: see 15 & 16 Vict., c. 83, s. 12.

In this letter the defendant intimated that one Perman, of Birmingham, had applied for letters-patent for "Improvements in Coal Vases," but that he could not ascertain what the improvements were until the end of the year. The defendant duly gave notice to proceed with the patent, and within three weeks after the advertisement thereof appeared in the *London Gazette*, viz. on the 13th of September, 1870, Perman gave notice that he objected to the letters-patent being granted to Evans, upon the ground "that the said Absolom Evans is not the first and true inventor of the said invention, the same having been previously invented by me, and letters-patent, bearing date the 15th of June, 1870, having been already granted to me for the said invention."

A copy of this notice of objection was forwarded by the defendant to the plaintiffs, on the 19th of September, 1870, accompanied by a letter containing this passage:—"I have received notice of *objection (a copy of which I inclose) to the [123 grant of letters-patent for your new automaton vase, applied for on the 30th of April, and which you will see is weeks before Perman applied, viz., the 15th of June. His patent was sealed on the 10th instant. Perman, I believe, cannot prevent you getting your patent sealed, and it will be dated prior to his; and, futhermore, I do not believe he can prove his allegations;" and in a postscript was added—"I have not the least doubt as to my ability to carry your patent through."

In a letter of the 20th of September, 1870, the defendant repeated his previous statement as to the worthlessness of Perman's patent, and requested "a cheque for, say, 15*l.* or 20*l.*, that I may apply for the report and seals at once."

A further sum of 15*l.* was accordingly remitted to the defendant on the 22d of September. And on the 8th of October he obtained from the plaintiffs a further sum of 20*l.*, which he represented as necessary to pay fees.

On the hearing, on the 11th of October, the Attorney-General refused his fiat for the sealing of the plaintiffs' patent, upon the authority of *Ex parte Bates* (1), where it was held, that leaving a provisional specification at the patent-office, and obtaining provisional protection, does not prevent a second applicant from leaving a provisional specification of a similar invention, and ob-

(1) Law Rep., 4 Ch., 577.

taining valid letters-patent for the invention, before six months have elapsed from the time when the first provisional specification was left; and that, in such case, letters-patent will not be granted to the first applicant for any part of his invention which is covered by the letters-patent already obtained by the second applicant.

Prior to that decision, which took place on the 25th of May, 1869, a general opinion had prevailed that, under the Patent Law Amendment Act, 15 & 16 Vict. c. 83, a provisional specification secured the invention for six months, and that, notice to proceed with the patent being given at the expiration of the first four months, and a complete specification being filed within six months, the letters-patent would be granted as of the date of the petition. The defendant was ignorant of that decision; and this was the negligence relied on.

A verdict was, under the direction of the learned judge, taken
124] *for the plaintiffs for an agreed sum of 31*l.* 10*s.*, leave being reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of negligence to go to the jury.

A rule to show cause having been obtained accordingly,

Anstie (*H. Matthews, Q.C.*, with him), showed cause. The defendant, who held himself out as a patent-agent, was bound to possess a reasonable degree of skill and knowledge in the law and practice respecting the grant of letters-patent. He was consequently guilty of actionable negligence in allowing so long a time to elapse between the filing of the provisional specification and the notice of his intention to proceed with Evans's patent, as to give a rival inventor an opportunity to intervene and perfect his letters-patent in the interim. His letter of the 9th of August, 1870, shows that the defendant had abundant warning of the impending danger; and, if he had then been aware, as he ought to have been, of the decision in *Ex parte Bates* (1), he might have averted it.

Lawrence (*J. O. Griffits* with him) in support of the rule. The only negligence that can be imputed to the defendant is that he was unaware of a recent decision by which the old practice

(1) Law Rep., 4 Ch., 577.

as to the obtaining of letters-patent was entirely changed. No doubt, as a patent-agent, he was bound to possess a reasonable degree of skill and knowledge of his profession; but he was not bound to be so intimately conversant with the law as to know the precise effect of the decision of *Ex parte Bates* (1). The law allows a patentee six months from the date of the provisional specification for filing a complete specification; notice to proceed being given at the expiration of the first four months. Can it be said that the defendant was negligent in delaying the necessary steps only for the periods allowed by law? Such a delay was always usual, and is frequently essential to the interest of the patentee. The defendant could have no notice of the precise character of the invention for which Perman's patent was taken out until the decision of the Attorney-General, on the 11th of October. The title would give him none.

*Byles, J. In this case the rule calls upon the plaintiffs to show cause why a nonsuit should not be entered, if this Court should be of opinion that there was no evidence of negligence. My Brother Lush, acting as judge and jury, directed a verdict for the plaintiffs. We ought not to interfere with that direction, unless we can clearly see that the learned judge was wrong in his view of the facts. I do not see that he was wrong; nor am I satisfied that I should not have come to the same conclusion that he came to. There were two facts before him which in my judgment tend to establish negligence on the part of the defendant: 1. The long interval between April and October which he suffered to elapse before he took steps to make the plaintiffs' patent available; 2. his ignorance of the decision in the case of *Ex parte Bates* (1), which, had he been aware of it, as I think he ought to have been, would have apprised him of the danger he was incurring. These grounds seem to me enough to sustain the verdict. [125

Brett, J. The defendant undertook for reward to act for the plaintiffs as a skilled agent in obtaining a patent for them. He was, therefore, bound to bring reasonable and ordinary care and knowledge to the performance of his duty as such skilled agent. It is suggested that the defendant did not bring reasonable and

(1) Law Rep., 4 Ch., 577.

ordinary care and skill, because he unnecessarily delayed applying to the Attorney-General for his fiat to get the letters-patent sealed, from the 28th of April, when he was instructed, until October. Now, if there had been no such decision as *Ex parte Bates* (1), I must confess I should not have thought that evidence of want of care and skill. The delay would not have been greater than was consistent with the exercise of ordinary care and skill. The ordinary practice was, to wait until the expiration of four months before giving notice of intention to proceed with the patent, and then to wait two months more before filing a complete specification and obtaining the great seal to be affixed. But in May, 1869, the case of *Ex parte Bates* (1) was decided by the Lord Chancellor, which totally altered the practice in this respect. I entirely agree that an agent of this kind is not 126] bound to be accurately acquainted with the *whole law of patents: but I think he is bound to know the law as to the practice of obtaining patents: and, as this was a most important decision with respect to the sealing of patents, the very practice the conduct of which he undertook for reward, I think he was bound to know it. Since that decision, patent-agents are not entitled to carry on their business as they had done before. If the defendant had regulated his course according to that decision, he would not have delayed so long in proceeding to perfect the patent which he was employed to obtain. For that delay he is I think responsible, especially as he was well aware that a second provisional protection had been obtained for a similar invention. I am clearly of opinion that there was some evidence of negligence to justify a jury in finding for the plaintiffs.

GROVE, J. I am of the same opinion. Had this case occurred prior to the decision of *Ex parte Bates* (1), I must confess I should have entertained great doubt. In obtaining letters-patent certain steps are to be taken at given periods, and certain fees are to be paid on the taking of each of these steps. It is not unreasonable that the agent should be anxious to save his client from an outlay that might turn out to be unnecessary. The invention might be of little value. If therefore the case had stood only upon the delay in giving notice of his intention to

(1) Law Rep., 4 Ch., 577.

proceed with the patent until the end of the prescribed period, I should have hesitated to say that he was guilty of negligence. So, again, I should have hesitated to hold the defendant guilty of negligence by reason of his being ignorant that Perman's invention was in substance the same as Evans's; for, as Mr. Lawrence very properly observes, he could not know that simply from the title. But I cannot help thinking that he was guilty of some negligence in not taking care to inform himself of a decision which operated so important a change in the practice as to the obtaining of patents. We all know that patent-agents are fully alive to all the decisions which take place upon the subject of patents: and I think we may fairly hold it to be part of the duty of one who holds himself out as one skilled in that branch of professional knowledge, to become acquainted with a decision which had so *important a bearing upon the [127 practice. It is now necessary to get a patent sealed as soon as possible, in order to prevent a rival inventor from stepping in as Perman did in this case. I cannot say that ignorance of that change in the practice was not some evidence of negligence.

Rule discharged.

Attorney for plaintiffs: *J. Needham, for Bolton, Waterhouse, & Bolton, Wolverhampton.*

Attorneys for defendant: *Wright & Venn, for Anderson, Collins, & Robinson, Liverpool.*

*CASES

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF COMMON PLEAS

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXV VICTORIA.

Jan. 22, 1872.

127] JOSSELYN v. PARSON and Others.

Law Reports, 7 Exchequer, 127.

Covenant not to carry on a Trade — Construction — "Merchant."

In an action on a bond, conditioned that the defendant should not "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise": —

Held (by Bramwell and Pigott, BB.; Martin, B., doubting), that the condition of the bond was not broken by the defendant's entering into the service, as traveller, of a brewer.

ACTION on a bond for 100*l*., dated the 22d of December, 1866, given by Henry Parson, as principal debtor, and the other defendants as his sureties, upon his entering into the employment, as traveller, of the plaintiff, a porter, ale, and spirit merchant, at Colchester; one of the conditions of the bond being, that the said Henry Parson "do not at any time or times within twelve calendar months after the termination of his service with the 128] said Charles Josselyn, travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise, in Colchester aforesaid, or within twenty-five miles thereof."

At the trial before Byles, J., at the Suffolk Summer Assizes, 1871, it appeared that the defendant quitted the plaintiff's service in April, 1871, and on the 12th of June following, entered the service, as traveller and collector, of Messrs. Daniels, who were brewers at Colchester, and solicited the plaintiff's customers within twenty-five miles of Colchester, for orders for ale and porter brewed by the Messrs. Daniels. At Colchester Messrs. Daniels had a brewer's (1) but not a dealer's license (2); in London they had a store, and took out a dealer's license, but only sold ale brewed by themselves at Colchester. It was contended for the defendants, that no breach of the condition was shown, a brewer selling his own beer not being a "porter, ale, or spirit merchant;" and a verdict was entered for the plaintiff for nominal damages, with leave to the defendants to move to enter it for them, the Court to be at liberty to draw inferences of fact, and their judgment to be final. A rule having been obtained accordingly.

No one appeared to show cause.

Bulwer, *Q.C.*, and *Graham*, in support of the rule, cited Com. Dig. Merchant (A): "Every one shall be a merchant who traffics by way of buying and selling, or bartering of goods or any merchandise, within the realm, or in foreign parts;" and contended that a man who merely sold what he manufactured could no more be called a merchant than a farmer could who sold the grain which he had raised, or the owner of a vineyard who sold the wine grown there. *A merchant is one who both buys and sells; that is, buys the same thing that he sells, and makes his profit out of the difference in price; and that the distinction between the trade of a dealer as carried on by the plaintiff, and the trade of a brewer as carried on by the Messrs. Daniels, was recognized by the Legislature in the various statutes, which regulated the different licenses granted to each.

*Bramwell, B. I think this rule should be absolute. [129 The question is, did the defendant by entering the service of a brewer, break his engagement not to enter the service of a

(1) See 6 Geo. 4, c. 81, s. 2; 11 Geo. 4 & 1 Wm. 4, c. 51, s. 7; 13 & 14 Vict. c. 67, ss. 6, 7.

(2) 6 Geo. 4, c. 81, s. 2; 26 & 27 Vict. c. 33, s. 1.

"porter, ale, *or* spirit merchant," in the disjunctive; that is, is a brewer, as such, without more, a porter or ale merchant? Now one understands a merchant of or in any merchandise, to be a merchant of that merchandise generally. A wine merchant deals in wine generally, port, sherry, claret, champagne, &c. He need not deal in every wine, for though he sold no Hungarian, he could well call himself a wine merchant. But if he sold port only, he should properly call himself a port wine merchant. So of a spirit merchant, he sells gin, brandy, rum, whisky, &c., and if he sold brandy only, should call himself a brandy merchant. A porter merchant, in the same way, sells porter generally, London porter, Dublin porter, Cork porter; but if he sold one sort only, he should describe himself accordingly as a Dublin porter merchant, or as they commonly say, agent for the sale of Dublin porter. Treating the defendant, therefore, as being in the service of a seller of one sort of beer and ale only, viz., his present master's brewing, I think his master ought to be called a Colchester beer merchant, or some other limited name. I think a porter merchant is a man who deals in all or many sorts of porter, not one only. On this ground alone I should think the defendant right.

But in addition to this I agree with Mr. Bulwer that a merchant of or in an article is one who *buys and sells* it, and not the manufacturer selling. A wine grower is not a wine merchant; even a wine importer is not called a wine merchant, but a wine importer. So of distillers, and so of a brewer, as here. The reason of the thing is the same way. The brewer is a man who deals with the ale and porter merchant, not one who competes with him, at least in all cases.

PIGOTT, B. I quite agree. There is all the difference between those who manufacture, and those who buy to sell again. The distinction is well defined, and generally understood; it prevails in many trades, and in none more than in this. It is the same that exists between a horse breeder and a dealer, or between a farmer and a meat salesman. The defendant's present employers are the very persons of whom the plaintiff would buy.
130] MARTIN, B. I do not dissent; but I must say that the matter does not present itself so to my mind. It appears to me that what the defendant has done is within the spirit and

meaning of the bond. But my learned Brothers are of a contrary opinion, and it appears that the learned judge who tried the cause agrees with them; the rule must therefore be made absolute.

Rule absolute.

Attorneys for plaintiff; *Doyle & Edwards.*
Attorneys for defendant; *Kingsford & Dorman.*

Jan. 29, 1872.

Britton v. Great Western Cotton Company.

Law Reports, 7 Exchequer, 130.

Master and Servant — Dangerous Machinery — Duty to Fence — Contributory Negligence — Knowledge of Danger — 7 Vict. c. 15, s. 21.

B., aged twenty-two, was employed by the defendants, the owners of a "factory" within the meaning of 7 Vict, c. 15, to grease the bearings between the fly and spur-wheel of a steam-engine in their engine-house. In order to do the work he had to stand on a wall 2 ft. 3 in. thick, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel; the fly-wheel being on his left hand revolving in a "wheel-race" in the engine house, and the spur-wheel on his right hand, revolving in another room in the factory. The distance between the spokes of the two wheels was 2 ft. 10 in. There was no fence along the wall edge of the wheel-race, on which B. was placed to do his work, and the fly-wheel, near to which, however, children or young persons were not liable to pass or be employed, was unfenced. At the time of the accident B., had been at the work for five days. On the sixth morning, he was caught by the fly-wheel, whirled into the air and killed. At the trial of an action by his widow and administratrix for pecuniary loss sustained by his death, the jury found that he had not been guilty of contributory negligence, either in undertaking the employment, or whilst engaged upon it, and returned a verdict for the plaintiff. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, and that the deceased had voluntarily encountered the risk incidental to his employment:—

Held, 1st, that the defendants were bound under 7 Vict. c. 15, s. 21, to fence the place where B. had to stand, it being the edge of a wheel-race not otherwise secured; and secondly, that the dangerous character of the employment was not so obvious as that he must necessarily be taken to have known it; or that, even assuming he did know it, that circumstance alone was not enough to constitute him a "volunteer" in such a sense as to exonerate the defendants from liability for the consequences of their breach of their statutory duty.

1872 Britton v. Great Western Cotton Co.

Semble, that the 7 Vict. c 15, s. 21, imposed on the defendants an unqualified duty to fence the fly-weeel, whether children were liable to pass or be employed near it or not.

DECLARATION by the plaintiff, as administratrix of Samuel Britton, deceased. 1st count, that at the time, &c., the defendants 131] *carried on their business in a factory at Bristol, and were the owners of machinery therein, and that Samuel Britton in his lifetime, was employed by the defendants as an engine-driver and an engineer to work for them in the factory, and in and about the machinery; and in the course of his employment it was necessary for him to place himself close to the fly-wheel and spur-wheel of a certain steam-engine, in order, at the defendants' request, to lubricate and keep lubricated the bearings connected with the fly-wheel and spur-wheel of the steam-engine; that through the negligence and default of the defendants, the fly-wheel and spur-wheel of the steam-engine were unsafely and defectively constructed, and were insufficiently guarded, fenced, and protected, and were in an unsafe and unfit condition for being used and lubricated, which the defendants well knew, and whereof Samuel Britton was ignorant; and by reason of the premises, and also by reason, as the defendants well knew, of no sufficient and proper apparatus having been provided by the defendants, to protect Samuel Britton while so employed by them in and about the lubricating the bearings connected with the fly-wheel and spur-wheel, from injuries arising from the unsafe and unguarded state of the fly-wheel and spur wheel, Samuel Britton, whilst he was lubricating the bearings, was caught by and became entangled with the fly-wheel which was then in motion, under the order and by the direction of the defendants; and was whirled, and dragged about, and injured, and afterwards and within twelve months before suit, died of his injuries.

2d count. That the defendants at the time, &c., and after the passing of the 7 Vict. c. 15 and 19 & 20 Vict. c. 38, carried on the business of cotton-spinners in a building at Bristol, and therein, for the purposes of the business, a steam-engine, producing steam power, was used to work machinery employed in preparing and manufacturing cotton and in the process incidental to the manufacture of cotton, the building being a "factory," within the meaning of the statutes; and there was

in part of the building a wheel-race, not in any way secured, and not fenced close to its edge, being a wheel-race within the meaning of the statutes; and in part of the building mill-gearing, being mill-gearing within the meaning of the statutes; and the machinery in the factory was, at the time, &c., put in motion, and was in motion by the steam-engine *and power [132 thereof for the purpose of the manufacture and process; the part of the building where it was in motion, not being a part which by the 73d section of the first-mentioned Act of Parliament or otherwise, was declared to be a part of the factory or place to which the enactments of the Act, or the definition of the word "factory," were not to extend. That the building with mill-gearing, steam-engine, and power, were, at the time, &c., under the care and management of the defendants, and were such as ought according to the statutes to have been securely fenced, and the wheel-race was a wheel-race not otherwise secured, which ought to have been fenced close to its edge; and the steam-engine was a steam-engine, near to which children or young persons were liable to pass, or be employed; and the mill-gearing was mill-gearing with which children, and young persons, and women, were liable to come in contact, either in passing, or in their ordinary occupation in the factory. That SamuelBritton was lawfully, and at the request of the defendants, in that part of the factory. Yet the defendants disregarded their statutory duty, and did not securely fence the steam-engine and mill-gearing, nor were the same or either of them securely fenced, and did not fence the wheel-race, not being otherwise secured, close to its edge, or otherwise secure the same; whereby Samuel Britton, deceased, was caught up, and whirled about by certain parts of the steam-engine and mill-gearing, and injured, and afterwards, and within twelve months before suit, died of his injuries; and that the plaintiff sued as administratrix to recover the pecuniary loss caused to herself, as the wife of the deceased, and to his child, by his death.

Pleas (inter alia): 1. Not guilty; 5, to 2d count, traverse that the machinery required fencing; 7, to same, that the deceased's death was caused by his own negligence. Issue. (1)

(1) 7 Vict. c. 15, s. 21 enacts, with regard to cotton among other factories, that "every fly-wheel directly connected with the steam-engine or water-wheel, or other mechanical power, whether in the engine-house or not,

133] *At the trial, before Brett, J., at the Bristol Summer Assizes, 1871, it was proved that Samuel Britton, who was twenty-two years old, entered the defendants' service as a coal trimmer on the 27th of September, 1870. He was promoted to be engine-driver on the 11th of October, and on the 14th of October was requested to grease the bearings between the fly and spur-wheel of a steam-engine. The fly-wheel was 15 feet and the spur-wheel 16 feet in diameter. At the time of the accident which caused his death, he had been five days at this work. In order to do it, he had to stand on a wall, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel, which was on his left hand, revolving in a wheel-race in the engine-house, at the rate of fifty-six revolutions a minute; the spur-wheel being on his right hand, revolving at the same rate in a room in the factory. The wall was 2 ft. 3 in. thick and the utmost distance between the spokes of the two wheels was 2 ft. 10 in. The wheel-race in which the fly-wheel revolved was fenced in the engine-house along its outer edges, but was unprotected on the wall side at the place where Britton was placed to do his work. On the sixth morning of his employment, he was caught up by the fly-wheel, whirled into the air, and killed. This action was then brought under Lord Campbell's Act, to recover the pecuniary loss caused to his widow and child by his death.

The learned judge was of opinion that there was no evidence for the jury on the first count of the declaration, and as to the second, that there was no duty under 7 Vict. c. 15, s. 21 to fence the fly-wheel unless children were liable to pass or be employed near it, but that there was an unqualified duty to fence the wheel-race not being otherwise secured, close to its edge; and asked the jury, first, whether the place in question was the

and every part of a steam-engine and water-wheel, and every hoist or teagle near to which children or young persons are liable to pass or be employed, and all parts of the mill-gearing in a factory shall be securely fenced; and every wheel-race not otherwise secured shall be fenced close to the edge of the wheel-race; and the said protection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam-engine, water-wheel, or other mechanical power for any manufacturing process.

19 & 20 Vict. c. 38, s. 4 enacts that the above section, "so far as the same refers to the mill-gearing, shall apply only to those parts thereof with which children and young persons and women are liable to come in contact either in passing or in their ordinary occupation in the factory.

edge of a "wheel-race" (as to which there was some conflict of evidence); and, secondly, whether the deceased had been guilty of contributory negligence either in undertaking the employment or whilst engaged upon it. *The jury answered [134 these questions in the plaintiff's favor, and a verdict was accordingly entered for her for £200, leave being reserved to the defendants to move to enter a nonsuit or verdict for them, if upon all facts the judge ought to have ruled that there was no evidence for the jury of their liability.

A rule was afterwards obtained accordingly, on the grounds, among others, that there was no statutory duty to fence the place in question, and that the deceased had voluntarily incurred the risks incidental to his employment.

H. T. Cole, Q.C. (*A. Charles* with him), showed cause. The defendants were guilty of a breach of their statutory duty. Sect. 21 of 7 Vict. c. 15 imposes on them an unqualified duty to fence the fly-wheel of a steam-engine, whether children are or are not liable to pass near it. The exemption from the duty to fence, except where there is a liability of children passing, is confined to the immediately preceding words "every hoist or teagle." As to the other parts of the machinery mentioned, the defendants must fence them in any event. Mill-gearing, it is true, by the subsequent Act (19 & 20 Vict. c. 38, s. 4) need not be fenced unless children are likely to pass or come into contact with it, but nothing in either of the Acts restricts the owner's duty in respect either of a fly-wheel or a wheel-race; and for a failure to perform that duty they are responsible to adults and children alike. No doubt the primary object of the Factory Acts was to protect young people, but, secondarily to protect all persons, old or young, employed in the factory: *Coe* v. *Platt* (1); *Doel* v. *Sheppard*. (2) Now, in the present case the jury have found that the deceased was at the time of the accident on the edge of a wheel-race; that being so, there should have been a fence to protect him, for the wheel-race was not "otherwise secured" within the meaning of the statute. Even assuming, therefore, that the earlier part of the section is ambiguous, and that the fly-wheel, not being easily accessible to children, did not require

(1) 6 Ex., 752; per Parke, B., at p. 757.

(2) 5 E. & B., 856; 25 L. J. (Q.B.), 124.

fencing, still the wheel-race ought to have been fenced. The defendants will contend that the outside edge of the wheel-race alone requires protection. But there is a fallacy in the term. 135] Every edge on which a person in the course *of his employment is required to stand needs a fence, and the place where the deceased was standing was, quoad him, an outside edge. If the Acts had been passed for the protection of the public there would have been some color for the defendant's contention. But they were passed not for the benefit of casual visitors to a factory, but for that of those whose daily work obliged them to be in positions of danger. Next it will be said that the deceased voluntarily undertook this employment, and was therefore disentitled to recover. But, there is no pretence that whilst at his work he was guilty of carelessness or misconduct, as was the case in *Caswell* v. *Worth* (1). The only contributory negligence he can be charged with was in going to the work at all; and as to this the jury have exonerated him. In fact, the place where he stood was not *necessarily* dangerous; and he might reasonably suppose it was a place to which he might go without imprudence. The work was to a certain extent hazardous, but still a knowledge of the danger is only an element in the case, and was properly left in this case to the consideration of the jury. *Holmes* v. *Clarke* (2) is a point for the plaintiff. There the person injured unquestionably knew and complained of the danger, and yet was held entitled to recover. There being, therefore, a clear default on the defendants' part, and no contributory negligence in the deceased, either in undertaking or whilst doing the work, the verdict ought to stand. He may have known the employment was dangerous, and yet not have appreciated the risk he was running, and unless he understood both the danger and the risk, the maxim, "Volenti non fit injuria," does not apply. He was not a "volunteer," and the defendants must bear the consequence of their breach of duty; *Patterson* v. *Wallace* (3); *Bartonshil Coal Co.* v. *Reid* (4).

Kingdon, *Q.C.*, and *Pinder*, in support of the rule. First, the fly-wheel did not require fencing, because there was no evidence

(1) 5 E. & B., 849; 25 L. J. (Q. B.), 121.
(2) 6 H. & N., 349; 7 H. & N., 937; 30 L. J. (Ex.), 135; 31 L. J. (Ex.), 356.
(3) 1 Macq., 748.
(4) 3 Macq., 266.

that children were liable to pass near it. As to the wheel-race it was "otherwise secured." The evidence was that it was only by crossing the fence which was erected round the outer edge and climbing through the spokes of the fly-wheel itself that the *deceased could reach the place where he had to [136 stand. The defendants had done all the statute required in protecting this outer edge, and the cavity in the wall was not such a place as required fencing within the meaning of the statute. It was not a place where, in the ordinary course of business any one would, or indeed could, go, and the deceased having consented to go there for a temporary purpose could not complain of the want of a fence. He was the author of his own misfortune, and in every sense of the word a "volunteer." It is true the jury exonerated him from contributory negligence, but the defendants have leave to enter the verdict if the Court should think that there was no evidence which ought to have been left to the jury; and here it was clear upon the whole facts that the deceased must have known, not only the dangerous character of his employment, but also the risk he was running. *Holmes* v. *Clarke* (1) is distinguishable. There the injured man was induced by the defendants' promise to fence to go on working, and met with his injuries while working upon the faith that his employers would protect him properly. Here the deceased of his own accord undertook the risks of the employment. He might have declined to do the work if he had chosen; but having undertaken it, with his eyes open, his representative cannot recover in this action: *Mellors* v. *Shaw* (2).

BRAMWELL, B. I think this rule ought to be discharged, although during the argument I have had great doubt as to what our decision should be. We might, in my opinion, found our judgment on the case of *Holmes* v. *Clarke* (1), where indeed there was a weaker case for the plaintiff than there is here. But though I agree in the decision arrived at there, I cannot follow the reasoning of some of the Judges in the Exchequer Chamber. This being so, I desire to show that independently of that authority I should have come to the conclusion in this case that the plaintiff is entitled to succeed.

(1) 6 H. & N., 349; 7 H. & N., 937; 30 L. J. (Ex.), 135; 31 L. J. (Ex.), 156.

(2) 1 B. & S., 437; 30 L. J. (Q. B.), 333.

Now I am clearly of opinion that the place where the deceased was standing ought to have been fenced. I think the true construction of the 7 Vict. c. 15, s. 21, is that there is an unqualified 137] *duty to fence "every fly-wheel directly connected with the steam-engine or water-wheel, or other mechanical power, whether in the engine-house or not," in all cases, whether children are liable to pass or not. That duty has since been limited as far as mill-gearing is concerned, by the 19 & 20 Vict. c. 38, s. 4, just as in the earlier Act the duty was limited as regards hoists or teagles. But I see no reason for construing the section otherwise than as imposing an obligation to fence the fly-wheel of a steam-engine and the engine, as absolute as exists in the case of a wheel-race. However, it is not necessary to decide this point, for the section proceeds to enact that "every wheel-race, not otherwise secured, shall be fenced close to the edge of the wheel-race;" and as to these words imposing a duty to fence in all events, there is no possibility of doubt. Then, in this case it is admitted that the wheel-race was not fenced, nor was it otherwise secured. But it is contended that no fence was wanted, because the edge where Britton was placed could only be reached in an exceptional manner, and was not a place where anybody would be except occasionally on some special duty. The evidence, however, does not support this contention, The deceased had himself been there for five days, and the place ought to have been fenced so as to prevent any one from falling against or becoming entangled with the wheel.

The defendants, therefore, were in default. But now we come to the great difficulty in the case. Does the maxim, "Volenti non fit injuria," apply? I think not. True, Britton was in one sense "volens." He need not have gone where he did. But he must not only be a volunteer in the sense that he went there when he might have stopped away, but it must clearly appear that he went voluntarily, with a full knowledge and understanding of the risk. It is suggested he must have known it. I doubt it. The jury have found him not guilty of contributory negligence either in going or being there, and I cannot say they were wrong. I do not myself see that the place was necessarily dangerous. At any rate the deceased may well have thought it was not. Indeed, the accident seems to have resulted not from the necessarily dangerous character of the

place, but from some misfortune which might have happened anywhere. It is further contended that at any rate the deceased knew the danger as well as his employers. That may be *doubtful in fact, for he seems not to have been a skilled [138 workman, but a coal trimmer. Assuming, however, that he did share his employers' knowledge, it must be remembered that the liability of the defendants here is not at common law but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, in consequence of that default, he was exposed. For these reasons, therefore, I think the verdict was right and ought to stand. The deceased is found by the jury not to have been guilty of any contributory negligence, and having regard to that finding and the mode in which the question was left to them, I cannot see that he was a "volunteer" in such a sense as to afford a defence to this action.

CHANNELL, B. I am of the same opinion. I agree with what has been said by my Brother Bramwell on the construction of the statute, and with the distinction between a statutory and common law liability, not by any means questioning the proposition, however, that in either case, contributory negligence on the part of the person injured would afford a defence. As to the second point, I do not think that the deceased was a volunteer in a sense which would have disentitled him to recover if he had lived. I think he might have maintained an action for the injuries he sustained. In *Mellors* v. *Shaw* (1) there is a marked distinction in the language used by Crompton, J. (2), in dealing with the case of one who undertakes dangerous work in the ordinary course of his employment, and one who undertakes extra risk for extra wages. In the latter case he would be properly considered a "volunteer," because for a higher rate of remuneration he undertakes the risk, knowing its nature.

I do not wish to add any observations on the particular facts of the present case. I think *Holmes* v. *Clarke* (3) is decisive in the plaintiff's favor. It was, indeed, a stronger case than this,

(1) 1 B. & S., 437; 30 L. J. (Q.B.), 333.
(2) 1 B. & S., at p. 446.
(3) 6 H. & N., 349; 7 H. & N., 937; 30 L. J. (Ex.) 135; 31 L. J. (Ex.), 356.

because there the plaintiff chose to go on working, although he knew the defendant had not securely fenced the machine, and yet he was held entitled to recover.

139] *PIGOTT, B. I agree in thinking that this rule should be discharged. The first question is whether the defendants are in default. That depends on the construction of 7 Vict. c. 15, s. 21; and I concur in the remarks of my Brother Bramwell on that section. The words as to the fencing of a wheel-race at least are clear. No doubt, if no one had ever had occasion to go to the place in question, it might be said that the wheel-race was "otherwise secured;" but here it was a workman's duty to go there continually, and there being no fence to protect him from falling into the race or against the fly-wheel, I think the defendants were guilty of a breach of their statutory duty. The place was neither fenced nor otherwise secured. Then, the next question is, whether deceased would have disentitled himself to recover by reason of contributory negligence. Upon the facts and findings of the jury I do not think he would. I do not think we can safely say that he must have known the risk he was running. The place was no doubt a dangerous place; but he may very well have been ignorant of the real nature of the risk.

I may add that I should have been better satisfied if *Caswell* v. *Worth* (1) had been otherwise decided; and that the master there should have been held liable, as he had been clearly guilty of a breach of his statutory duty. However, there is nothing in that case inconsistent with our decision here. It seems that even although there may be a statutory duty, imposed on the employer, the workman must still be careful of his own safety. In this case there is nothing to show that the deceased knowingly incurred the danger, or was guilty of any want of care, and the defendants, therefore, ought to bear the consequences of their own clear neglect of duty.

Rule discharged.

Attorneys for plaintiff: *Gregory, Rowcliffes, & Co., for Benson & Elletson, Bristol.*
Attorneys for defendants: *Meredith & Co.*

(1) 5 E. & B., 849; 25 L. J. (Q. B.), 121.

*CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

HILARY TERM, XXXV, VICTORIA.

Jan. 20, 1872.

THE QUEEN v. JOSEPH NEWBOULT AND BENJAMIN HOLDSWORTH. [344

Law Reports, I Crown Cases Reserved, 344.

Arson — Indictment — Immaterial Averment — Statement of Ownership — 24 & 25 Vict. 97, ss. 3, 60.

Two prisoners were indicted, under 24 & 25 Vict. c. 97, s. 3, for feloniously setting fire to a shop "of and belonging to" one of the prisoners:—

Held, that the averment of property in the prisoner was an immaterial averment, which need not be proved; and that an intent to injure another person as owner might be proved in support of the indictment.

CASE stated by Pigott, B.

The prisoners were tried at the last winter assizes for the West Riding of Yorkshire, holden at Leeds, on the charge of arson.

The substance of the indictment was as follows:—

First count. That Joseph Newboult and Benjamin Holdsworth maliciously and feloniously did set fire to a shop of and belonging to the said Joseph Newboult, and then being in the possession of the said Joseph Newboult, with intent thereby to injure, against the form of the statute (1).

The second count was in the same form, except that the intent laid was to defraud.

(1) 24 & 25 Vict. c. 97, s. 3, enacts that "whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop . . . whether the same shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony."

The third count stated that the said Joseph Newboult and
345] *Benjamin Holdsworth unlawfully, maliciously, and feloniously did set fire to divers matters and things then being in and under a certain shop there of and belonging to the said Joseph Newboult, and then being in the possession of the said Joseph Newboult, with intent thereby and by means thereof unlawfully, maliciously, and feloniously to set fire to the said shop, and thereby to injure and defraud, and the said Joseph Newboult and Benjamin Holdsworth by the overt acts in this count mentioned unlawfully, maliciously, and feloniously did attempt to set fire to the said building in this count mentioned under such circumstances that if the same had thereby been set fire to they would have been guilty of felony against the form of the statute.

At the conclusion of the case for the prosecution it was objected on behalf of the prisoners that as no policy of insurance upon the premises was produced, there was no evidence from which the jury could infer an intent to injure the insurance office. And, secondly, that upon the counts of this indictment it was not open to the jury to convict of an intent to defraud or injure the owner of the premises, inasmuch as the premises were in the indictment alleged to be "of and belonging to Joseph Newboult" himself, and must hence be taken to be his property.

The learned judge refused to stop the case, but reserved the questions for this Court.

The prisoner Newboult was the master and Holdsworth was his servant at the shop in Leeds Road, Bradford, where a general grocery business was carried on, and where a fire occurred on the 5th of October last. The material evidence on which the counsel for the prosecution relied to show the intent to injure or defraud was, as to the ownership of the premises, as follows:—John Hey stated that he was a trustee of the premises for the landlady, and that Joseph Newboult was under notice to leave, and should have left on the 5th of September last, and that the witness a week before the day of the fire had asked him to leave the premises, which he had not done. And as to the other objection, evidence was given that a notice to produce a policy of insurance (effected by the prisoner Newboult on his stock) was served on him, but too late to be complied

with, and the learned judge held it was insufficient on that ground. The counsel then called a witness *from the [346 insurance office, who said, "Newboult came to me in May, 1867, about effecting an insurance, and on the 30th of August of the present year (1871) he came again, and said he wished to renew his policy in Leeds Road for 500*l.* (the same amount), and he then paid me ten shillings." The stock of goods on the premises at the time of the fire was of the value of 21*l.*

Both prisoners were found guilty.

And the learned judge asked the jury if they believed that Newboult was tenant of the premises; and further, whether both prisoners had an intent to injure the landlady? And also whether they believed they had an intent to defraud the insurance office?

The jury answered that they found both intents.

The questions for this Court were, whether — first, there was sufficient evidence of the existence of an insurance to support the finding by the jury of an intent to defraud the office; and secondly, whether on these counts it was competent for the jury to find that there was an intent to injure the owner of the premises.

The case was argued before Cockburn, C.J., Martin, and Channell, BB., and Keating and Lush, JJ.

Waddy, for the prisoners. There is no sufficient evidence of the existence of a policy to support the finding of an intent to defraud the company. And the indictment alleges the shop set on fire to be "of and belonging to the said Joseph Newboult," the prisoner himself; whereas the evidence is that the house was the landlady's, and the finding is that the intent was to injure the owner. It is necessary to allege the ownership of the house: *Rickman's Case* (1); 2 Russell on Crimes, 4th ed., by Greaves, 1046.

[Cockburn, C.J. By s. 60 of this Act, 24 & 25 Vict. c. 97, it is sufficient in any indictment for any offence under the Act, when it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be) without alleging an intent to injure or defraud any particular person.]

(1) 2 East, P. C., 1034.

That only refers to alleging the intent; it leaves the law as it was as to alleging the ownership.

[MARTIN, B. The rule referred to an indictment at *common 347] law.. This is an offence against s. 3 of 24 & 25 Vict. c. 97. The averment of ownership is an immaterial averment, and might be struck out. Were it not so, there would, no doubt, be a variance.

COCKBURN, C.J. The statement of ownership was necessary at common law, because it was not arson for a man to set fire to his own house. But under the statute it is otherwise; and therefore the averment of ownership is an immaterial averment; so that there is nothing to prevent the jury under this indictment finding an intent to injure the landlady, the real owner.]

Campbell Foster, for the prosecution, was not called upon.

Conviction affirmed.

Attorneys for prosecution: *Terry & Robinson, Bradford.*
Attorney for prisoner: *Fluker, for J. W. Berry, Bradford.*

Jan. 20, 1872.

THE QUEEN v. THOMAS BAILEY.

Law Reports, 1 Crown Cases Reserved, 347.

Larceny — Process of Court — Taking with Fraudulent Purposes — 24 & 25 Vict. c. 96, s. 30.

The prisoner's goods having been seized under warrants of execution of a county court, and being in the possession of the bailiff, the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him:—

Held, that the prisoner was not guilty of larceny, but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 Vict. c. 96, s. 30.

CASE stated by Lush, J.

The prisoner was indicted at Oxford at the summer assizes

1871, under the 30th section of the Larceny Act, 24 & 25 Vict. c 96. (1)

*The first count of the indictment charged the prisoner [348 with stealing certain process of a court of record, to wit, a certain warrant of execution issued out of the county court of Berkshire, in an action wherein one Arthur was plaintiff, and the prisoner defendant; also another warrant of execution out of the same court in an action, Halcombe & Co., against the prisoner.

The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody of certain process of a court of record, to wit, a warrant of execution out of the county court of Berkshire in an action between Arthur and the defendant; that defendant intending to prevent the due course of law, and to deprive Arthur of the rights, benefits, and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he Brooker having then the legal custody of it.

It was proved that two actions had been brought in the county court against the prisoner, in each of which judgment had been given against him, and a warrant of execution issued against his goods. The high bailiff of the court made the levy under these warrants, and having done so, he handed the warrants over to his deputy bailiff, and left him in possession of the goods.

The prisoner, a day or two afterwards, forcibly took the warrants out of the bailiff's hands and kept them. He then ordered him away as having no authority to remain there any longer, and on his refusal to go forcibly turned him out.

The prisoner was convicted; but as the learned judge entertained a doubt whether these facts supported the count for larceny, and whether, as the prisoner's intention in taking the warrants was not to make use of them but merely to deprive the bailiff, as he supposed, of his authority and as the validity

(1) 24 & 25 Vict. c. 96, s. 30, enacts that, "Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole, or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal begun, depending, or terminated in any such court, . . . shall be guilty of felony."

of the execution was not affected by his taking the warrants, he was guilty of taking them for a fraudulent purpose within the meaning of the statute, he forbore to pass sentence, and admitted the prisoner to bail till the opinion of this Court should have been taken upon the above points.

No counsel appeared.

COCKBURN, C.J. I think the first count, charging larceny, 349] will *not hold. It is clear that the prisoner took the warrants from the bailiff thinking that his authority depended on his possession of the warrants, and that by taking them away he would put an end to the authority. But this was not done animo furandi; it was not done lucri causâ. It was no more stealing than it would be to take a stick out of a man's hand to beat him with it.

Under the second count, the question is whether what was done was done with a fraudulent purpose. I think it was so. The purpose was to deprive the officer of the power to execute process, and so to defeat the execution.

MARTIN and CHANNELL, BB., and KEATING, J., concurred.

LUSH, J. I quite concur, on consideration, in the judgment of the Court. I thought at first that what the statute meant was an intention to use the documents for a fraudulent purpose.

Conviction affirmed.

Jan. 27, 1872.

THE QUEEN v. PAYNE and Others.

Law Reports, 1 Crown Cases Reserved, 349.

Evidence — Competence — Joint Indictment and Trial — One Prisoner called as Witness for Another.

Where two prisoners are indicted and tried together, one is not a competent witness for the other.

CASE stated by Keating, J.

John Payne, George Owen, Isaac Owen, and Joseph Curtis, were indicted at the winter assizes for the county of Worcester,

1871, for that they, to the number of three or more, armed with offensive weapons, by night, did enter and move on land belonging to Earl Dudley, for the purpose of taking or destroying game.

It appeared that at one o'clock on the morning of the 4th of October, 1871, the keepers of Earl Dudley discovered a number of poachers upon the earl's lands taking game. They were armed with stones, bludgeons, &c., and advanced upon the keepers with whom they had a desperate struggle. Ultimately the keepers were forced to retire, one keeper being dangerously, and another severely wounded.

*The prisoner Payne, and the two Owens, were first [350 apprehended, and on being brought before the magistrates, each set up an alibi by way of defense, and called witnesses in support; amongst the witnesses called by Payne was the prisoner Curtis, not then in custody, and he proved having been with Payne at the time in question at a place so distant from the scene of the affray as to render it impossible he could have been one of the poachers. Curtis, with the other witnesses for the prisoners, were bound over by the magistrates under 30 & 31 Vict. c. 35; but having been afterwards identified as one of the party of poachers, he was committed and indicted with the other three prisoners.

On the trial all four prisoners were sworn to by various witnesses as having formed part of the gang of poachers on the night in question; the defence by each was, as before the magistrates, an alibi, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. The learned judge held that he was incompetent, and could not be called. All the prisoners were convicted, and sentence passed.

The questions for the opinion of the Court were:

First, Whether a prisoner, jointly indicted with another, can, after they have been given in charge to the jury, be called as a witness for the other, without having been either acquitted or convicted, or a nolle prosequi entered: *Winsor* v. *The Queen* (1), *Reg.* v. *Deeley* (2).

Second, Whether upon the present form of indictment, and

(1) 6 B. & S., 143; 35 L. J. (M. C., 121; S. C.), in Ex. Ch.; 7 B. & S., 490; 35 L. J. (M. C.), 161.

(2) 11 Cox, Cr. C., 607.

under the circumstances of the case, the prisoner Curtis was competent and ought to have been called as a witness for the prisoner Payne: see Russell on Crimes, 4th ed., by Greaves, pp. 626–7; Taylor on Evidence, 5th ed., pp. 1178–9.

Jan. 20. The Court (Cockburn, C.J., Martin and Channell, BB., Keating and Lush, JJ.), reserved the case for the consideration of all the judges.

Jan. 27. The case was argued before Cockburn, C.J., Kelly, C.B., Martin, Bramwell, Channell, Pigott, and Cleasby, BB., 351] Willes, *Byles, Keating, Blackburn, Mellor, Lush, Brett, Grove, and Quain, JJ.

T. S. Pritchard (*Selfe* with him), for the prisoner. The reason why at common law a party to any proceeding, whether civil or criminal, was not admissible as a witness, was on the ground of interest: *Worrall* v. *Jones* (1). In Phillips on Evidence, 8th ed., p. 68, it is expressly so stated as to criminal proceedings: "With regard to the competency of defendants in criminal prosecutions, it is scarcely necessary to observe, that as they are in general immediately interested in the event, it does not often happen that they can be called as witnesses." Then 6 & 7 Vict. c. 85, s. 1 (2) abolished in general terms incapacity from

(1) 7 Bing., 395.

(2) 6 & 7 Vict. c. 85, s. 1, enacts that "no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or injury [sic], or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offense: Provided that this Act shall not render competent any party to any suit, action, or proceeding individually named in the record, or any lessor of the plaintiff or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf, any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively. . ."

crime or interest, and that would have admitted the testimony of the parties to any proceeding, civil or criminal, including a prisoner under such circumstances as the present, had it not been for the proviso which excludes "any party individually named in the record." Then came 14 & 15 Vict. c. 99 (1), s. 1 of which repealed the above *proviso in the earlier Act. [352 Section 2 makes the parties to any proceeding competent witnesses, "except as hereinafter excepted." And s. 3 gives the exceptions, viz., that a person charged in any criminal proceeding shall not be a witness for or against himself, and that the husband or wife of a party charged shall not be admissible for or against the wife or husband. Therefore, the old incapacity on the ground of interest having been swept away by the earlier Act, and the excluding proviso in that Act repealed by s. 1 of the later Act, and parties expressly made competent by s. 2, the only witnesses whose testimony is excluded are those excepted in s. 3, viz., a prisoner called on his own behalf, and the

(1) 14 & 15 Vict. c. 99, s. 1, enacts that, "So much of s. 1 of 6 & 7 Vict. c. 85, as provides that the said Act shall not render competent any party to any suit, action, or proceeding individually named on the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, is hereby repealed."

S. 2: "On the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding, in any court of justice, or before any person having by law, or by consent of parties, authority to hear, receive, and examine evidence, the parties thereto, and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended shall, except as hereinafter excepted, be competent and compellable to give evidence, either vivâ voce or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the said suit, action, or other proceeding."

S. 3: "But nothing herein contained shall render any person who in any criminal proceeding is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband."

S. 4: "Nothing herein contained shall apply to any action, suit, proceeding, or bill, in any court of common law, or in any ecclesiastical court, or in either house of parliament, instituted in consequence of adultery, or to any action for breach of promise of marriage."

husband or wife of a prisoner called for or against the wife or husband.

[BLACKBURN, J. By s. 3, a prisoner cannot give evidence for or against himself. But if a prisoner on his trial is examined, he must be cross-examined; and that can hardly be without his giving evidence against himself.

COCKBURN, C. J. Is s. 3 an exception to s. 2 at all? Must not the proceeding in s. 2 mean proceeding ejusdem generis 353] with the *suit or action specifically mentioned? And if so, can the section apply to criminal proceedings at all? The words "civil or criminal," used in the older Act, are omitted in this section.]

Section 2 expressly refers to s. 3 by the words, "except as hereinafter excepted."

[BRAMWELL, B. Those words may well apply to s. 4, which excepts proceedings founded upon adultery, and for breach of promise of marriage.

LUSH, J. Section 3 speaks also of the case of the husband or wife of a person accused; and that cannot be an exception to s. 2, for s. 2 would not apply to the case.]

There is authority for the admissibility of this evidence. In *Reg* v. *Deeley* (1) Mellor, J., admitted similar evidence. And that ruling has been followed by Pigott, B., in *Reg* v. *Parry and Allman* (2), and by Lush, J.

[KEATING, J., referred to *Reg* v. *Stevenson and Coulter*, before Ball, J., at the Armagh Spring Assizes, 1851, cited 3 Russell on Crimes, 4th ed., by Greaves, 627, n.]

The law is so laid down in 2 Taylor on Evidence, 5th ed. 1179: "If, therefore, several persons be jointly indicted, any one of them may, under s. 2, be called as a witness either for or against his confederates, excepting only in those few cases where the indictment is so framed as to give him a direct interest in obtaining their discharge," such as those in which the offence can only be committed by a certain number of persons; and the writer treats *Reg* v. *Jackson* (3), to the contrary effect, as overruled. And this passage is cited without disapproval in 3 Russell on Crimes, 4th edition, by Greaves, p. 625. Upon the analogous question, as to the admissibility of the evidence of the wife of one prisoner as a witness for another tried

(1) 11 Cox, Cr. C., 607. (2) Not reported. (3) 6 Cox, Cr. C., 525.

jointly with him, there has been some conflict of authority; but the later cases are in favor of its admissibility. In *Rex* v. *Smith* (1) such evidence was held inadmissible by all the judges except Graham, B., and Littledale, J. But in *Reg* v. *Moore* (2), though *Rex* v. *Smith* (1) was cited, Maule, J., admitted such evidence. And in *Reg* v. *Bartlett* (3), Wightman, J., after *consulting Cresswell, J., took the same course. In the [354 present case it appears that the prisoner whom it was proposed to call had actually been examined before the magistrates; and he had been bound over to appear and give evidence under 30 & 31 Vict. c. 35, s. 3. It cannot have been intended that a prisoner should be deprived of the benefit of that section by the witness being subsequently included in the indictment.

[COCKBURN, C.J. The remedy for that is to apply to have the prisoners tried separately. And if the witness were improperly included in the indictment, the judge would, no doubt, grant such an application.]

The fact of the proposed witness having been given in charge to the jury does not affect the case. There is no giving in charge in misdemeanor; and in felony its only effect is to identify the prisoner whom the jury have to try.

[BLACKBURN, J. It is much more than that. It fixes irrevocably that the particular jury to whom he is given in charge is the one to decide his guilt or innocence. Can it be that the jury which has to do this may first hear him examined and cross-examined?]

In *Winsor* v. *The Queen* (4) the witness was jointly indicted with the prisoner, and had been given in charge, and no verdict had been taken as to her, nor a nolle prosequi entered. But it was the opinion of all the judges that her evidence was properly received. (5)

[BLACKBURN, J. The witness was a party to the record; but had not been given in charge to the same jury.]

It is true that in that case Cockburn, C.J., says (6), that "in all cases where persons are jointly indicted, and it is thought necessary to have the evidence of one against the other, it is better, in order to insure the greatest amount of truthfulness of

(1) 1 Moo. Cr. C., 289.
(2) 1 Cox, Cr. C., 59.
(3) 1 Cox, Cr. C., 105.
(4) 6 B. & S. 143; 35 L. J. (M.C.), 121; S. C. in Ex. Ch. 7 B. & S., 490; 35 L. J. (M.C.), 161.
(5) 7 B. & S., at pp. 494, 503.
(6) 6 B. & S., at p. 178.

the testimony, that a verdict of not guilty should be taken, or, if the circumstances admit of it, a plea of guilty should be taken, and sentence passed." But that is only a suggestion of convenience, not a binding rule.

[COCKBURN, C.J. A notion has gone abroad that I laid down 355] *that one of these courses must be taken. That is very different from what I did say; I only spoke of what is convenient.]

F. T. Streeten (*Jelf* with him), for the prosecution. The common law principle is correctly stated in *Hawkesworth* v. *Howler* (1), by Lord Abinger, C.B., viz., that a party to the record, and affected by the issue, was incompetent. And the statutes cited have not altered it in the case of a prisoner on his trial. The first Act, 3 & 4 Wm. 4, c. 42, s. 26, was limited to actions. 6 & 7 Vict. c. 85, s. 1, applied to criminal proceedings as well, so far as to remove the incapacity from crime or interest. But the proviso excluding parties does not mention criminal proceedings. This shows that the person jointly indicted with another was not excluded on the ground merely of interest.

[BLACKBURN, J. What interest can one person be said to have in getting off another?

BRETT, J. Is not the true ground the broad one that no one on his trial for a criminal offence can be examined or cross-examined, because no one is bound to criminate himself?]

14 & 15 Vict. c. 99, s. 2, does not apply to criminal cases at all; and s. 3 is only introduced ex majore cautelâ. It was introduced in the House of Lords against Lord Campbell's protest. But even if that section did apply, still by s. 3 a man cannot give evidence for or against himself; and if he is put in the witness-box while on his trial there is no drawing the line, and he must give evidence against himself. The cases to the contrary which have been cited are mere rulings at the assizes, and cannot weigh with this Court against clear principles; and the rule cited from Taylor on Evidence is not law.

Pritchard, in reply, referred to *Reg.* v. *Stewart.* (2)

COCKBURN, C.J. We are all of opinion that the evidence rejected was properly rejected. We are all agreed that the ex-

(1) 12 M. & W., 45, at p. 47.

(2) 1 Cox, Cr. C., 174.

ception in 14 & 15 Vict. c. 99, s. 3, was introduced to prevent any possibility of its being thought that the law as it had existed from the earliest times was altered by the Act. By that law it was a distinguishing characteristic of our criminal system that a prisoner on his trial could neither be examined nor cross-examined. We *think it is impossible to suppose that it [356 could have been intended to change this rule by a mere side-wind by means of this exception.

Conviction affirmed.

Attorney for prosecution: *R. Saunders, Jun., Kidderminster.*
Attorney for the prisoner: *Miller Corbett, Kidderminster.*

Jan. 30, 1872.

The Queen v. Samuel Smith Ward.

Law Reports, 1 Crown Cases Reserved, 356.

Wounding — Indictment for Felony — 24 & 25 Vict. c. 100, s. 18 — Conviction for Misdemeanor — 14 & 15 Vict. c. 19, s. 5 — Malice — Intent to Frighten — Evidence.

The prosecutor and prisoner were out at night in separate punts, on a creek, in pursuit of wild fowl. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental result of the slewing round of the punt. The night was light and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired apparently with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding with intent to do grievous bodily harm; but the jury, under 14 & 15 Vict. c. 19, s. 5, found him guilty of the misdemeanour of unlawfully wounding:—

Held, that "unlawful wounding" within the meaning of that section must be "malicious;" and that there was proof of malice, which justified the conviction of the prisoner.

Case stated by Cockburn, C.J.

The prisoner was tried before me at the last assizes for the county of Suffolk, on a charge of unlawfully, maliciously, and

feloniously wounding one William Job Chatten, with intent to do him grievous bodily harm.

The prosecutor, Chatten, and the prisoner were both fishermen, living at Aldebury, in Suffolk, and both were in the habit of going out in punts to shoot wild fowl, in a creek of the River Alde.

The manner of using a punt for the purpose of shooting wild fowl is that the gunner lies with his face downwards in the boat, extending his arms over the sides, and propelling the boat by
357] *means of a pair of short paddles, so as to avoid, as much as possible, being seen by the birds on the water.

On the evening of the 30th of January, 1871, the prosecutor, Chatten, was on the water in his punt, in pursuit of wild fowl. Having been out some time, and finding no birds about, he determined to return, and having put his arm out was using the paddle to slew the punt round for that purpose, when he suddenly heard the report of a gun, and at the same time found himself struck by several shots in the left arm and eye, the effect of which was seriously to injure his arm, and so to damage his eye as to render its total extraction necessary a few days after.

There was no doubt that the shot by which the prosecutor was injured was fired by the prisoner. On the prosecutor calling out on being struck, and asking who had fired the shot, the prisoner, who was in his punt, about twenty-five yards off, came forward, and said he had fired it, adding that, if Chatten had not turned his boat round as he, prisoner, was in the act of firing, the shot would not have struck him. This being so, the question in the case was under what circumstances and with what intention prisoner had fired off the gun.

It was proved that the night was light, so that birds and, a fortiori, a punt on the water could have been plainly seen at a distance of fifty to sixty yards; and it was positively sworn by the prosecutor that there were no birds about on that evening, certainly none in the neighborhood of his boat. It was plain, therefore, that the prisoner had not fired for the purpose of killing wild fowl. Evidence was given from which it appeared that the prisoner was extremely jealous of persons going in pursuit of wild fowl on the water where the event took place, and had on different occasions used threatening language to the effect that he should shoot at birds if occasion offered, notwith-

standing other persons might be between him and them; and it was suggested by the prosecution that the prisoner had intentionally shot at the prosecutor with the intent to injure him, and thereby to prevent him pursuing wild fowl on the water in question in future.

On the other hand it appeared that the prosecutor and the prisoner had always been on good terms, having formerly been shipmates on board the same pilot vessel. It was admitted by the *prosecutor that, on his calling out, the prisoner at [358 once came forward, and ascribed the fact of the shot having taken effect to the sudden change of the position of the prosecutor's boat — a change of position which was an admitted fact — and assured the prosecutor that the result was purely accidental. It appeared that the prisoner had towed the prosecutor's punt into the harbor, and rendered him every assistance in getting on shore. The prisoner received an excellent character for good conduct and humanity.

Under these circumstances it seemed to be more probable that the prisoner shot off his gun in the direction of the prosecutor's boat, with the intention of frightening him, and so deterring him from again coming into the creek for the purpose of fowling, rather than that he shot with the intent of doing him bodily harm. While, therefore, the learned judge left the question of the intent charged in the indictment to the jury, he directed them that, if they took the more favorable view of the case, they should find the prisoner guilty of unlawfully wounding. This they accordingly did; but thinking it deserving of consideration whether a wounding occasioned by an act done without any actual malice or intention of offering violence to the prosecutor, would be sufficient to constitute an "unlawful wounding" within the meaning of the statute 24 & 25 Vict. c. 100, s. 20, the learned judge reserved that question for the consideration of this Court, and requested their judgment thereupon.

1871. Nov. 18. The Court (Kelly, C.B., Byles, Lush, and Hannen, JJ., and Pigott, B.), reserved the case for the consideration of all the judges.

Jan. 30. The case was argued before Cockburn, C.J., Kelly, C. B., Martin, Channell, Bramwell, Pigott, and Cleasby, BB.,

Willes, Byles, Blackburn, Mellor, Lush, Brett, Grove, and Quain, JJ.

[COCKBURN, C. J. The statement of the statute in this case is wrong, the question before us really arises on s. 5 of 14 & 15 Vict. c. 19 (1).]

359] **Metcalf*, for the prisoner. The indictment is under 24 & 25 Vict. c. 100, s. 18, which provides for the felony of wounding with intent to do grievous bodily harm. Section 20, enacting that whosever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person shall be guilty of a misdemeanor, takes the place of the repealed 4th section of 14 & 15 Vict. c. 19. But s. 5 of the last mentioned statute is still in operation.

[COCKBURN, C.J. And, strange to say, was omitted from the Consolidated Act, 24 & 25 Vict. c. 100.]

It enables the jury trying a prisoner upon an indictment for felonious wounding to acquit him of the felony, and find him guilty of the misdemeanor of unlawful wounding only. But if they do so they must find him guilty of unlawfully and *maliciously* wounding, although the word maliciously is not in s. 5.

[COCKBURN, C.J. The wounding stated in the indictment *minus* the intent there charged?]

Yes; the offence provided for by s. 4 of the same Act or the equivalent section of the recent statute. Secondly. Malice is essential, either actual or such as the law would imply. There must be an unlawful act done with intention to assault. If a man fired *at* another even from so great a distance that the shot

(1) 14 & 15 Vict. c. 19, s. 5, enacts that "if upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding."

24 & 25 Vict. c. 100, s. 18, enacts that "whosoever shall unlawfully and maliciously wound any person with intent to do grievous bodily harm, shall be guilty of felony."

Sect. 20 enacts that "whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor. . . ."

would not reach him, still there would be an intention to hit him. But the prisoner did not aim at the prosecutor.

[MARTIN, B. Is not careless firing which causes a wound sufficient?]

It is not; and were death to ensue the person wounding would *be guilty of manslaughter, but not of murder, because [360 he had no malice. The question is whether "maliciously" means "intentionally." Suppose one to fire from his own land across a highway and to shoot a passer-by: although it is unlawful to fire on the highway, yet could it be said that the injury to the person was a malicious wounding? Or again, if a bonfire were made near a public road, which would be an illegal act, and the flame, blown by the wind, ignited a haystack, could the offender be convicted under 24 & 25 Vict. c. 97 of unlawfully and maliciously setting fire to the hay?

BLACKBURN, J., referred to *Reg.* v. *Child* (1).]

The jury have found no intent to injure. "Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse," per Littledale, J., in *McPherson* v. *Daniels* (2).

[BLACKBURN, J. I have always thought a man acts maliciously when he willfully does that which he knows will injure another in person or property.]

It will suffice for the present argument to treat the word "maliciously" as synonymous with "intentionally;" *Reg.* v. *Noon* (3); *Reg.* v. *Sparrow* (4). Some meaning and effect must be given to the word.

[MELLOR, J. Was there not malus animus in the prisoner who intended to frighten the prosecutor away?]

He had no evil mind *to wound.*

[COCKBURN, C.J. When a man does an act malicious of itself, but without intending larger consequences, are not the limited results sufficient to make him responsible for all? To support an indictment for murder it is enough to prove that the act causing death was done maliciously, and it is not necessary to show an intention *to kill.*]

Then if this act of which the prisoner has been convicted had caused death, his offence would have been murder. Firing a

(1) Law Rep., 1 Cr. C., 307.
(2) 10 B. & C., at p. 272.
(3) 6 Cox, Cr. C., 137.
(4) Bell, Cr. C., 298.

gun to frighten was unlawful, but the wound not having been given intentionally the act was not malicious, and therefore not within the terms of the statute.

[MELLOR, J. In the introduction to the Discourse of Homicide 361] *by Foster, p. 257, we read that the legislature has frequently used the terms malice and maliciously in a general sense, "as denoting a wicked, perverse, and incorrigible disposition."]

No counsel appeared for the prosecution.

COCKBURN, C. J. We have considered this case, and are all agreed that in construing s. 5 of 14 & 15 Vict. c. 19 we should read that section as though the term *malicious* had been introduced, and that it is an essential element in a conviction under that section that the act which caused the unlawful wounding should have been done maliciously as well as unlawfully. With respect to whether the facts of the present case as stated amount to proof of the necessary malice or not, the Court has been divided, twelve out of fifteen judges being of opinion that there was proof of malice. The conviction must therefore, be affirmed.

Conviction affirmed.

Attorney for prisoner : *Storey for Chamberlain, Yarmouth.*

Whatever is intentionally done is wilfully and maliciously done.

People v. Bogart, 3 Abb. Prac., 193, 3 Park, 143; 2 Chitty's Cr. Law (Am. Ed. 1847), 245 note; People v Brooks, 1 Den., 457: People v. Clark, 7 N. Y. R., 385. Reg v. Bradford Bell's, C.C. 268, Reg v. Holroyd, 2 Mood. & Rob., 339; Amy v. Supervisors, 11 Wallace, 136.

END OF HILARY TERM, 1872.

*CHANCERY APPEAL CASES

(Including Bankruptcy and Lunacy Cases)

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEAL IN CHANCERY.

L. JJ. Nov. 4, 1871.

FARQUHAR v. HADDEN. [1

[1869 F. 30].

Law Reports, 7 Chancery Appeals, 1.

Will — Specific Legacy — Bequest of Share in a specific part of Partnership Property — Exoneration.

F. and *L.* were partners entitled in equal shares. Part of the assets consisted of leasehold premises vested in them as joint tenants, in which the business was carried on. *F.*, by his will, bequeathed to *L.* "all my share of the leasehold premises in which my business is carried on." After *F.'s* death the assets of the partnership proved insufficient to pay the partnership debts, though *L.* and the estate of *F.* were amply solvent. *L.* bought the share of *F.* in the leasehold premises, without prejudice to his rights under the bequest; and a certificate having been made in a suit for the administration of *F.'s* estate, showing that it was solvent, *L.* presented a petition to have it declared that the effect of the bequest was to give him a moiety of the leasehold, exonerated out of *F.'s* estate from the partnership debts, and for the return of the purchase-money which he had paid:—

Held (reversing the decision of *Stuart*, V.C.), that the bequest only gave such interest in the leasehold as *F.* had, namely, a right to a moiety subject to payment of the partnership debts; and that as the partnership debts exhausted the assets the bequest failed.

THIS was an appeal by the children of the testator, *T. N. Farquhar*, from an order made by Vice-Chancellor *Stuart* on the petition of *Joseph Leech*.

Previously to, and up to, the death of the testator, he and **Leech* carried on business as solicitors in partnership. They [2

were entitled in equal shares. Part of their partnership assets consisted of certain leasehold offices in *Moorgate Street*, the legal estate in which was vested in them as joint tenants.

Farquhar made his will, dated the 6th of October, 1863, containing the following bequest: "I bequeath all my share of the leasehold premises in *Moorgate Street* and in *Old Palace Yard*, or elsewhere, in which my business is carried on, and all my share of the office furniture, books, and other office or household effects therein respectively, to my partner, *Joseph Leech*, in case he shall be living at my decease, for his own absolute use and benefit." He gave pecuniary legacies to his children, and bequeathed his residuary estate among them.

The testator died in July, 1866. The lease of the premises in *Old Palace Yard* expired shortly after his decease, and no question arose as to them. A question, however, arose soon after his death as to the operation of the bequest of the testator's share in the *Moorgate Street* premises, and it was arranged that *Leech* should purchase a moiety of those premises for £4000, and a moiety of the books, furniture, &c., for £400, without prejudice to any question as to his rights under the bequest; and a moiety of the leasehold premises likewise was accordingly assigned to him upon his paying £4400 to an account which had been opened at a bank for the purpose of receiving the assets of the firm.

Owing to depreciation in the leasehold property of the partnership, it turned out that the assets of the firm were insufficient to satisfy its debts, though both *Farquhar's* estate and the surviving partner were amply solvent after paying whatever might be required to make up the deficiency.

This suit having been instituted for the administration of *Farquhar's* estate, and a certificate having been made stating that no creditor had proved, *Leech* presented a petition stating to the above effect, except that it did not show that he and the testator were at law joint tenants of the leasehold, and praying that it might be declared that the bequest was a bequest of an undivided moiety of the leasehold premises and other particulars comprised in the bequest, without regard to the state of the partnership assets and liabilities, and that in settling accounts 3] between the *testator's estate and the petitioner he was entitled to have credit given him for the £4400.

Vice-Chancellor *Stuart* made an order containing a declaration to the effect prayed, and ordering the costs of the petitioner to be paid out of *Farquhar's* estate (1).

(1) 1871. February 24.

SIR JOHN STUART, V.C.:—

This question seems to me to be reasonably clear, if it is considered that it is a question that arises in the administration of the estate of one partner who has chosen to make his surviving partner an object of his bounty. Mr. *Farquhar*, by his will, in clear and distinct terms, has specifically given to Mr. *Leech* all his share of the leasehold premises in *Moorgate Street*, in which the business was carried on. Here the specific matter of the bequest is very clearly and distinctly stated. The testator and Mr. *Leech* were tenants in common of this leasehold property, each entitled to an undivided moiety; and in language as distinct, I think, as any language could well be, that undivided moiety of the leasehold property which he had he has given to his partner.

But it is said in the administration of the estate of the testator, not in the administration of the affairs of the partnership, there is an equity as between the several legatees of the testator and this specific legatee, and that I am to consider that what the testator gave is not what he has described, but that what he gave was only such interest in that leasehold property as he might have after the affairs of the partnership were wound up. Now, if the testator had said so, of course this specific legatee could get no more than that. But there is nothing in the will to show anything of the kind. The claim is a claim by the pecuniary and residuary legatees of the testator to get part of what was specifically given to another object of the testator's bounty, which is ridiculous, because a specific legatee is entitled to the specific legacy, unless the estate is insolvent. In this administration suit it appears from the Chief Clerk's certificate that there is no insolvency, yet, in administering his estate, I am called on to say, in the case of a testator as to whose estate no creditor has come in to make any claim, that the specific legatee shall be disappointed.

As to the rights of the creditors of the partnership, that is entirely another thing, because each party is liable to the whole extent of his assets to make good the partnership debts; and it can make no difference that the whole of this as well as the whole of Mr. *Leech's* property is applicable to satisfy the partnership debts.

I had some doubt whether the Court could regularly interfere upon this petition of a specific legatee and make such a declaration or give such a direction as is sought; but on looking at the form of the decree, I see that the decree is distinctly that the whole real and personal estate of the testator should be administered; and in that state of things, although the accounts taken are only accounts of the property not specifically bequeathed, there being no doubt of the existence of this specific property, and what the nature of the property was, and the extent of the testator's interest in it, I think the case is one in which there is no formal difficulty in making the declaration, though not exactly in the form in which it is asked. What I propose to do is to make an order, saying, "It appearing by the certificate of the Chief Clerk that no person has come in under the decree and claimed any debt out of the estate of the testator, declare that the petitioner, as specific legatee thereof, under the will of the testator, is entitled to all the share of the testator of and in the leasehold premises in *Moorgate Street*, and also to the testator's share of the office furniture, &c., and is, as between

4] *Sir *Roundell Palmer*, Q.C., Mr. *Greene*, Q.C., and Mr. *T. Stevens*, for the Appellants:—

The bequest passes only such interest as the testator had after payment of the partnership debts: *West* v. *Skip* (1); *Taylor* v. *Fields* (2): *Barker* v. *Goodair* (3); *Dutton* v. *Morrison* (4); *Darby* v. *Darby* (5). The partnership being insolvent, this interest was nothing, and the gift fails.

Mr. *Dickinson*, Q.C., and Mr. *Daniel Jones*, for the Respondent:—

We do not dispute that a partner's interest in a partnership chattel is only a share of what remains of it when the partnership debts have been paid; but no case goes to this, that a partner may not, as between his own legatees, treat a certain partnership chattel as exempted from payment of debts. Effect ought, if possible, to be given to the words of a will, and it may be given to this bequest by exonerating the specifically bequeathed chattel out of the testator's other property, the case being really very much the same as that of a specific bequest of an incumbered chattel, which must be exonerated out of the general estate. If the testator had assigned to *Leech* by deed, it is clear that *Leech* would have been entitled on the footing we contend for, and less effect cannot be given to the bequest.

Sir W. M. James, L.J.:—

With deference to the Vice-Chancellor, I am bound to say that I entertain no doubt whatever as to the proper construc-
5] tion to be *put upon this instrument. The question is, what is the natural, grammatical, and ordinary meaning of the words of the bequest to the testator's partner. It is admitted that if those words had been used in a bequest to anybody else it would only have given the interest which the testator had

himself and the estate of the testator, so entitled, free from any liability in respect of the obligations or liabilities of the partnership; and that, in adjusting the accounts of the partnership between the Plaintiffs the executors of the testator, and the Petitioner, the Petitioner is entitled to have credit for the sum of £4400, being the amount produced by the sale in the petition mentioned of the property comprised in the specific bequest."

(1) 1 Ves. Sen., 239.
(2) 4 Ves., 396.
(3) 11 Ves., 78, 85.
(4) 17 Ves., 193.
(5) 3 Drew., 495.

in this property at his death, namely, a right to a moiety, subject to the application of the assets of the partnership in payment of the partnership debts. What is contended by the Respondent is, in fact, that the bequest was not merely a gift of the interest of the testator in the property, but a gift of that interest, with an additional gift of so much of his residuary personal estate as should be required to free this property from its ordinary liability to pay the partnership debts. I cannot find anything of that kind in the will, and even were I at liberty to guess at the intention of the testator, I should not arrive at a conclusion favorable to Mr. *Leech's* claim. We are asked to attribute to the testator an intention that, in case the partnership assets should turn out to be insufficient for the payment of the partnership debts, then the partner was to have a right to call on the testator's estate to contribute more than its ordinary share towards payment of them, in order to give effect to this bequest. If I were to guess at the testator's intention, that would be the last thing that I should guess him to have intended. If the gift had been, as the Vice-Chancellor seems to have treated it as being, a gift of "my moiety," and the testator and his partner had been tenants in common at law, so that the testator would have had at his death a legal and equitable estate, which would pass to his executors, it might require some further consideration as to whether the gift would not then have been a gift of a moiety free from partnership debts, and whether Mr. *Locke King's Act* would apply to take away the right to exoneration. But we have not to deal with that case; we have to deal with a case in which the partners were joint tenants at law, and in which the testator's only transmissible interest in the property was the equitable interest of a partner in a part of the partnership assets; and we have to give effect to the words "all my share of the leasehold premises." Mr. *Leech* at law became liable for all the debts of the partnership, and he had a right to have all the assets of the partnership applied in payment of such debts; and the thing answering to the description of "all my share" is such interest in the leasehold *as the executors could have claimed from [6 Mr. *Leech* if there had been no bequest to him. There is nothing to give him right to call on the testator's estate to pay more than its share of the partnership debts, in order to increase

the value of this bequest. I am, therefore, of opinion that, as the assets of the partnership have been absorbed in payment of partnership debts, the bequest failed, and that the Vice-Chancellor's order is erroneous, and ought to be reversed.

Sir G. Mellish, L.J.

I am of the same opinion. Let us first consider what is the plain, natural, and grammatical meaning of the words which the testator has used. The testator had no interest in this house at all, except his interest as partner with Mr. *Leech*; they were joint tenants of the lease, and his interest simply consisted of an interest which the estate of a deceased partner has in equity in the assets of the partnership, that is to say, an interest subject to the payment of the debts of the firm. That being his interest, he bequeaths "all my share of the leasehold premises, and of the office furniture and books, &c.," to his partner. It is said that that is an inaccurate description. I do not see that there is in it any substantial inaccuracy. He had an interest in the property, subject to the payment of the debts — such an interest as a creditor of his might have taken in execution; that was the interest which he had, and that is what he leaves to his partner. That, however, may not be conclusive if we find in the surrounding circumstances and facts of the case, which we are entitled to take into consideration, and in the language of the rest of the will, anything which shows us that he really did intend, in all events, whether the partnership was solvent or not, that Mr. *Leech* should have a moiety of this property. But in order to justify a departure from the grammatical construction, one must be convinced that the testator contemplated the events that have happened, and that he intended, in the events that have happened, that Mr. *Leech* should take. I am convinced that he did not contemplate these events at all, but thought that the partnership was perfectly solvent, and intended, on that assumption, that his partner should continue to be in the personal enjoyment of the partnership property for the purpose of carrying on the 7] business. It is plain to my mind that *the real object of the testator in the gift was that he thought the enjoyment of this property would be more advantageous to his partner than to anybody else, and he therefore gave it him that he might con-

tinue in that personal enjoyment. That shows plainly that he never thought the partnership was insolvent, so that this property would be required for the payment of partnership debts. Therefore I am clearly of opinion that he never contemplated the event of the partnership being insolvent, and had no intention to make any provisions for giving effect to this bequest in the event of such insolvency. The order of the Vice-Chancellor must be discharged, and Mr. *Leech's* petition dismissed with costs.

Solicitors: Messrs. *Lyne & Holman;* Mr. *Leech.*

Radford v. Willis.

L.JJ. Nov. 11, 1871.

[1871 R. 58.]

[Law Reports, 7 Chancery Appeal Cases 7.]

Will — Construction — Gift to Husband of Unmarried Daughter — Word "Unmarried" — Vesting — Doubtful Title — Specific Performance.

A testator gave his estates to trustees upon trust to pay the rents to his two daughters (both then unmarried) in equal shares during their respective lives "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry;" and after their respective decease, upon trust to convey the estates "unto and equally between the respective husbands of them, my said daughters, to hold to them respectively, and their respective heirs and assigns;" with a proviso, that if either of his daughters should "depart this life unmarried," her share should go to the survivor for her life, and on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—

Held, (reversing the decision of *Wickens*, V.C.), that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband gives an indefeasibly vested remainder in fee to her first husband. And that, as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser.

This was an appeal by the Plaintiffs from an order of Vice-Chancellor *Wickens* allowing a demurrer.

**Thomas Draper* devised and bequeathed his real and per-[8

sonal estate to trustees, in trust to pay the income to his daughters *Ann* and *Lucy* in equal shares, during their respective lives, "independently of the control of any husband or husbands with whom they or either of them may happen to intermarry;" and after their respective decease, the trustees were to stand possessed of the property "upon trust to convey and assure, assign, pay, and transfer the whole thereof unto and equally between the respective husbands of them, my said daughters, to hold to them respectively, and their respective heirs, executors, administrators, and assigns, according to the several natures and qualities thereof respectively. Provided always, that if either of my said daughters shall happen to depart this life unmarried, then and in such case the share of such daughter in and to my aforesaid trust estate and premises, stocks, and funds, and securities, shall accrue and belong to the survivor of them, my said daughters, and be taken and enjoyed by her for her life in like manner as is before directed with respect to her original share;" and on her decease the whole shall devolve to, and shall be conveyed, assured, assigned, and transferred to the husband of my said surviving daughter, as is hereinbefore directed with regard to her said original share."

At the time when the will, which was dated in January, 1831, was made, both the testator's daughters were spinsters. *Ann* married *William Radford* in March, 1831. The testator died in March, 1832; and in September, 1832, *Lucy Draper* married *Daniel Pearce*.

Ann Radford died in February, 1868, leaving her husband surviving her. *Daniel Pearce* died in March, 1868, having, by his will, devised his share in *Thomas Draper's* property to his wife, *Lucy Pearce*, absolutely. *Lucy Pearce* and the trustees of the will of *William Radford* contracted to sell part of *Thomas Draper's* real estate to the Defendant, who took the objection that *Lucy Pearce* had not a good title to a moiety, for that, if she married again and left a husband surviving her, such husband would become entitled to her share, or to a moiety of it. In order to have the question decided, a bill was filed by the vendors for specific performance, showing the nature of the title; to which bill the Defendant demurred. Vice-Chancellor *Wickens* allowed the demurrer (1).

(1) Law Rep. 12 Eq., 105.

*Mr. *Greene*, Q.C., and Mr. *H. J. M. Williams*, for the [9 Appellants:—

The devise gives an indefeasibly vested estate in the first person answering the character of husband: *Jarman* on Wills (1); *Driver* v. *Frank* (2); *Stanley* v. *Stanley* (3); *Boreham* v. *Bignall* (4); *Stert* v. *Platel* (5). "Unmarried" means here "never having been married": *In re Sanders' Trust* (6); *Heywood* v. *Heywood* (7). A direction to convey to a person at a future time, when the conveyance is postponed merely on account of the existence of prior interests, does not constitute a contingent gift; nor is it necessary that the person to be benefited should be living at the time when the conveyance is to be made: *Adams* v. *Bush* (8); *Carlton* v. *Thompson* (9); *Re Mottram* (10); *Parker* v. *Sowerby* (11); *Smith* v. *Palmer* (12). The case of *Peppin* v. *Bickford* (13) is distinguishable. The Court will not hold the title doubtful, though the Judge below was against it: *Beioley* v. *Carter* (14); *Alexander* v. *Mills* (15).

Mr. *Shebbeare*, for the defendant:—

As regards the point of construction, *Peppin* v. *Bickford* is undistinguishable from the present; and the natural construction of the words points to a husband who survives the wife, for to no other could a conveyance be made. The language of the separate use clause shows that the testator had second husbands in his contemplation. The construction for which the Plaintiffs contend makes the scheme of the will most unreasonable. Suppose the first husband were to die early, without children, the widow would be restricted to a life interest, after which the property would go away to strangers. *Longworth* v. *Bellamy* (16) is a strong authority in favor of an after-taken husband. At all events, the title is too *doubtful to be forced on a purchaser, [10 depending, as it does, on the construction of a very inartificially-framed will.

(1) Vol. 1, 3d Ed., 304.
(2) 3 M. & S., 25; 8 Taunt., 468.
(3) 16 Ves., 491.
(4) 8 Hare, 131.
(5) 5 Bing. N. C., 434.
(6) Law Rep., 1 Eq., 675.
(7) 29 Beav., 9.
(8) 6 Bing. N. C., 164.
(9) Law Rep., 1 H. L., Sc., 282.
(10) 10 Jur. (N.S.), 915.
(11) 1 Drew., 488.
(12) 7 Hare, 225.
(13) 3 Ves., 570.
(14) Law Rep., 4 Ch., 230.
(15) Law Rep., 6 Ch., 124.
(16) 40 L. J. (Ch.), 513.

SIR W. M. JAMES, L.J.:—

I am unable to agree with the Vice-Chancellor in this case. I have no hesitation in saying that, in the absence of a controlling context, a gift to an unmarried woman for life, with remainder to her husband in fee, vests an indefeasible estate of inheritance in the person who first answers the description of her husband. The case is one in which the broad general principle that the Court favors vesting more than contingency seems to me to be eminently applicable. A state of circumstances has been urged in argument in which, no doubt, the giving an indefeasible estate of inheritance to the first husband would produce an undesirable result; but a far more probable state of things — one much more likely to have been contemplated by the testator — is, that the first husband might die in the lifetime of the wife, leaving a family of children; and to suppose that the testator intended in such a case to give the property to the second husband, leaving the children wholly unprovided for, would be attributing to him so unreasonable an intention that we ought not to adopt a construction which would have that effect, unless we are obliged to do so. A gift to the lady for life, with remainder to her husband in fee, vests the property in the person who, according to the most natural and probable course of events, will be the father of her family, so as to enable her and him together during their lives, and him alone after her death, to make provision for the family. The case is, in my opinion, one where the rule in favor of early vesting ought to be applied more than in almost any other case.

Then is there any controlling context to raise a doubt as to the applicability of the general principle? In my opinion, none. In fact, the context, in my judgment, is strongly in favor of the construction to which the general rule would lead us; for I cannot bring my mind to doubt that by the word "unmarried" the testator meant "without having been married." If this view be adopted, we have a gift to the daughter for life, with alternative gifts, which exhaust the entire fee; if she marries it is given to her husband; if not, then upon the limitations of 11] the other moiety. *It is urged that the direction to convey makes it probable that the testator intended to point out a person to whom a conveyance could be made — a husband liv-

ing at the time when the conveyance was to be executed. I am of opinion that there is nothing in this argument, the direction to convey being only in substance a direction to clothe the equitable interest with the legal estate. Then it is said that the gift to the separate use must mean that the wife was to enjoy the property free from the control of any husband; but that is not in the least inconsistent with a gift in fee to the first husband. If the testator did contemplate that his daughter might marry a second husband, that does not alter the plain meaning of the words, which import a gift to the first husband.

My opinion, therefore, is decidedly in favor of the title, and the question being one depending on a broad general principle of construction not affected by any special context, I am of opinion that there is no such doubt in the case as to induce us to refrain from saying that the title is one which must be forced on the purchaser. As, however, the purchaser has concurred in taking the opinion of the Court in the least expensive way, I think that he ought to be excused from paying costs.

Sir G. Mellish, L.J.:—

I am of the same opinion, and for the same reasons.

Solicitors: Mr. *W. H. Bishop*: Mr. *W. Wyatt.*

L.JJ. Nov. 21, 1871.

*Poole v. Poole. 17

[Law Reports, 7 Chancery Appeals, 17.]

Will — Advancement — Statute of Limitations — Interest.

A testator, by his will, gave his property to his wife for life, and after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter *M. B.*, the sum of £200 which he had advanced to her, and add it to his personal estate; and that if, at the period of distribution, *M. B.* "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing." *M. B.* had borrowed from one brother £100, on a promissory note bearing interest, and had borrowed other

sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the *Statute of Limitations*:—

Held, by the Vice-Chancellor of the Duchy Court of *Lancaster*, that the trustees were authorized to deduct from *M. B.'s* share all the debts, though barred by the statute, with the interest on such as carried interest:—

Held, on appeal, that the decree was right so far as regarded the principal of the debts, though barred by the statute; but that the intention of the testator was to put advances by brothers and sisters on the same footing as advances by himself, and that interest, therefore, ought not to be deducted.

THIS was an appeal by *Margaret Beck* from a decision of the Duchy Court of *Lancaster*.

Ralph Poole, the testator in the cause, by his will, dated the 6th of February, 1859, gave his real and residuary personal estate to trustees upon the usual trusts for conversion and investment, and upon trust to pay the income to his wife for life, and after her decease (subject to certain trusts declared as to a sum of £500, part thereof), he directed his trustees to stand possessed of three-sixths of the trust moneys upon trust to invest them as therein mentioned, and pay the income of one of such shares to each of his daughters, *Alice Hayes*, *Margaret Beck*, and *Ann G. Nicholls*, during her life for her separate use, and after the death of each to stand possessed of the capital of her share in trust for her children who should attain twenty-one or marry; and if more than one, in equal shares. He then proceeded: "I nevertheless subject and make chargeable the share of my said daughter *Margaret Beck*, with the sum of £200 already advanced to her 18] by me, and direct *my trustees to deduct the same from the sum of money or share to which she would have been entitled under this my will, and add the same to the residue of my personal estate. And I further direct that if, at the period of the distribution and investment of the several shares of my said daughters as aforesaid, my said daughter *Margaret Beck* shall be indebted to any or either of her brothers or sisters in respect of advances made to her, that my said trustees shall be empowered to deduct all or any such debts or advances from her share as aforesaid, and to pay the same to the brother or sister to whom the same may be owing, whose receipts shall be discharges to my said trustees." He then proceeded to dispose of the three other sixth shares in favor of his sons or their issue.

The testator died on the 1st of July, 1860, and his wife on the 9th of May, 1868. On the 5th of August, 1870, a decree was

made for the administration of his estate, at the suit of two infant children of his deceased son *John Poole*.

The Registrar, by his report, found that *Margaret Beck* became indebted to her brother *John Poole*, on a promissory note dated the 10th of May, 1852, for £100 and interest at £5 per cent. No part of the principal, nor any interest, had ever been paid. She also became indebted to her brother *Ralph*, in 1858 and 1859, in the sum of £47 16*s*. for money lent; and in 1863, in the sum of £44 17*s*. for money lent, making together £92 13*s*. No payment had ever been made in respect either of principal or interest.

By the order, on further consideration, it was declared that the power of deduction extended to any debts owing by *Margaret Beck* to any of her brothers or sisters, in respect of any advances made at any time before the death of the testator's widow to *Margaret Beck* while discovert, but not to any debts owing by her in respect of any other considerations; and that, in respect of any advances which might have been so made at interest, the power extended to authorize the deduction of the interest as well as the principal; and that the power might properly be exercised notwithstanding the death of any brother or sister who might have made any such advances; and notwithstanding that as respected any of such advances, or any interest upon interest-bearing advances, *Margaret Beck* would be able effectually to plead the *Statute of Limitations*.

*Mr. *Karslake*, Q.C., and Mr. *Lake*, for the Appellant:— [19

We rely on the legal sense of the word "indebted." The demands must be debts. Now, under a charge by will of a man's own debts, those barred by the *Statute of Limitations* are not payable: *Burke* v. *Jones* (1); and a trust to pay the debts of another person does not revive debts barred by the statute at his death: *O'Connor* v. *Haslam* (2). "Debts" mean debts which could be recovered.

[The Lord Justice James referred to *Courtnay* v. *Williams* (3).]

(1) 2 V. & B., 275.

(2) 5 H. L. C., 170.

(3) 3 Hare, 539; 15 L. J. (Ch.), 204.

At all events, we ought not to be charged with interest: *Askew* v. *Thompson* (1).

Mr. *Finch*, *contrà*, was desired to confine himself to the question of interest, and contended that where a debt by the terms of the contract carried interest, the interest must stand on precisely the same footing as the principal, being a part of the debt.

Mr. *Marten*, for the trustees.

Sir W. M. James, L.J.:—

I think that we ought to vary the Vice-Chancellor's order with regard to the interest, but that in other respects it is right, and that the *Statute of Limitations* does not apply. The true meaning of the will appears to me to be, that advances made to *Margaret Beck* by her brothers and sisters were to be put on the same footing as if the testator himself had made them. He first refers to an advance made by himself, then to advances by the brothers and sisters, and directs them to be taken into account so as to make a fair distribution of his property between his children. The question whether the decision as to advances made during coverture is right, has not been argued, but I am disposed to think it right, for it is difficult to see how an advance during coverture, which would in effect be a payment to her husband, could be treated as an advance to *Margaret Beck* herself. I think the fair interpretation of the testator's words is, that he intended the advances to be allowed for as ad-
20] vances, not as debts; and that, therefore, only the *capital ought to be taken into account, and not any interest abcrued before the estate became divisible.

Sir G. Mellish, L.J.:—

I am of the same opinion.

Solicitors: Messrs. *Parkers, Pritchard, & Sharpe*; Messrs. *Hopwood & Sons*; Messrs. *Milne & Co.*

(1) 4 K. & J., 620.

The statute of limitations bars the *remedy* only. The debt or liability remains, and is not extinguished. *Waltermire* v. *Westover*, 14 *N. Y.*, 20, 21. *Watkins* v. *Stevens*, 4 *Barb.*, 178, 179.

1871 Nov. 25, 1871. L. JJ.

*In re GIBSON, a supposed insane person. [25

[Law Reports, 7 Chancery Appeal, 52.]

Lunatic — Past Maintenance — Lunacy Regulation Act, 1862.

A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1838 to 1859, at a total expense of more than £700. The brothers having suffered losses in trade, and being unable further to support her, she was kept in a county asylum, at the expense of the county, from 1859 to 1871, the total expense exceeding £300. In 1871 a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers under-

Phillips v. *Peters*, 21 *Barb.*, 351, 358. *Winchell* v. *Bowman*, 21 *Barb.* 448. *Higgins* v. *Scott*, 2 *Barn. & Adolph.* (22 *Eng. C. L. R.*), 413. *Brickett* v. *Davis*, 21 *Pick.*, 410. *Shears* v. *Hartley*, 3 *Esp.* 81.

It is only the remedy *in personam* which is barred. *Jones* v. *Merchants' Bank*, 4 *Rob.*, 227.

In pursuance of these doctrines it has been held, that, although the statute bars an *action* by an attorney against his client for his services, he has a lien upon the judgment for his costs, and the sheriff, who has collected them on an execution issued by another attorney, will be directed to pay the attorney who procured the judgment the amount of his costs taxed therein. *Higgins* v. *Scott*, 2 *Barn. & Adolph.* (22 *Eng. C. L. R.*) 413.

And that a limitation of the time of bringing an action upon a judgment does not restrict the right afterward to issue an execution upon it during its existence as a lien. *Waltermire* v. *Westover*, 14 *N. Y.*, 16.

And notwithstanding the statute of limitations bars an action upon a debt it does not interfere with enforcing an equitable lien upon lands for its payment. *Heyer* v. *Pruyn*, 7 *Paige*, 465.

The statute creating a presumption of payment of any debt after the expiration of twenty years from the time it accrued, was designed to shield *defendants* only, and a plaintiff cannot invoke it. If a plaintiff ask a specific performance, the presumption of payment is not sufficient evidence of payment to entitle him thereto. He must prove payment in fact. *Morey* v. *Farmers, etc.*, 14 *N. Y.*, 302.

And so in ejectment for land, the defendant cannot set up an equitable title and rely upon the presumption of payment arising from the lapse of time, because to establish the defence of an equitable title in himself he is bound to show that he is entitled to a conveyance, and must prove payment, in fact, of the purchase-money. *Lawrence* v. *Ball*, 14 *N. Y.*, 477.

In an action for the conversion of stocks by refusing to deliver them, it is a valid defence that they were pledged to secure a debt, even though it be barred by the statute of limitations, for the plaintiff is not entitled to a return of the stock without paying the debt. *Jones* v. *Merchants' Bank*, 4 *Rob.*, 221.

taking to maintain her in future; and, *semble*, they would, even without giving this undertaking, have been entitled so to be repaid for past maintenance.

CHRISTINA GIBSON, a person of unsound mind, but not found so by inquisition, was kept in a private lunatic asylum at the expense of her brothers, *Thomas Gibson* and *Alexander Gibson*, from 1838 to 1859, at an expense of more than £700 in the whole. In that year her brothers, having had losses in business, became unable to continue to support her, and she was placed in the *Colney Hatch Asylum*, where she was thenceforth kept at the expense of the county of *Middlesex*.

In February, 1871, the sum of £641 7*s.* 10*d.* was paid to *Thomas Gibson* and *Alexander Gibson*, being a share of the residuary estate of *F. Scott*, who bequeathed it to *Christina Gibson*, but directed his trustees to pay it to them, "as acting for and in behalf of their said sister, and whose receipt, as managing for her, shall be a sufficient exoneration and discharge to my said trustees, recommending to them the care of their said sister, and to apply the bequest hereby made to her for her benefit, at such times and in such manner as to them may seem most for her interest."

53] **Thomas Gibson* thereupon communicated with the Commissioners in Lunacy, and arrangements were made for removing the lunatic to a private asylum, and purchasing for her a life annuity with the £641 7*s.* 10*d.*; but before it had been carried out a claim was made on *Thomas Gibson* by the treasurer of the county of *Middlesex* for £309 16*s.* 4*d.*, for the past maintenance of the lunatic in the county asylum.

On the 9th of September, 1871, the Commissioners in Lunacy reported that the income of the lunatic's property was not duly applied for her benefit. It was thereupon referred to the solicitor to the suitors' fund to take proceedings for the purpose of protecting the lunatic's property, and making her income available for her maintenance, and it was arranged that a Petition should be presented by *Thomas Gibson* stating the above facts. The Petition prayed that the costs of the Petitioner might be paid, and that the Petitioner and *Alexander Gibson* might be directed whether they should retain the balance in satisfaction of what they had expended on the maintenance of the lunatic, or whether they should pay the claim of the treasurer

of the county of *Middlesex*, and from time to time repay him the further sums which he might expend for her maintenance at *Colney Hatch*, so far as the property would extend.

Mr. *Cracknall*, for the Petitioner, referred to *Re Macfarlane* (1), and stated that his client was willing to give the same undertaking as was given in that case to provide for the future maintenance of the lunatic, upon receiving the fund for past maintenance.

Mr. *Method*, for the solicitor to the suitors' fund, referred to the *Lunacy Regulation Act*, 1862 (25 & 26 Vict. c. 86), sects. 12, 13.

Mr. *Schomberg*, Q.C., for the justices of *Middlesex* :—

It is quite clear that the justices are entitled to be repaid out of this fund, unless the Petitioner can make out a prior claim. This, I submit, he cannot do, for his maintaining the lunatic was a voluntary act which creates no debt.

The Lord Justice Mellish :—A lunatic cannot contract for *his maintenance, so whoever maintains him becomes a [54 creditor by implied contract.]

If there be a debt it is barred by the *Statute of Limitations*.

The Lord Justice James :—The holders of the fund cannot be obliged to set up the statute against themselves.

Sir W. M. James, L.J. :—

The Petition must be amended by making *Alexander Gibson* a co-Petitioner, and, upon the Petition so amended, I am of opinion that the Petitioner is entitled to an order. The lunatic was maintained by her brothers for some years, and it is the regular course of the Court to apply a lunatic's property in payment of past maintenance. When property comes in it is right and honest that past maintenance should be paid for. I think the brothers would have been entitled to this, even without giving the undertaking which they have offered.

(1) 2 J. & H., 673.

SIR G. MELLISH, L.J. :—

I am of the same opinion.

Solicitors: Messrs. *Denton, Hall, & Barker;* Messrs. *Johnson & Master;* Messrs. *Allen & Son.*

As to allowing a father for the past maintenance of a child, see *Smith* v. *Goertner*, 40 How. Prac., 185; *Buckworth* v. *Buckworth*, 1 Cox. Chy., 80, & note to Hoffman's ed.; *Andrews* v. *Partington*, 2 Cox. Chy., 223; *Maberlyn* v. *Turton*, 14 Vesey, 499; *Stephens* v. *Lawrey*, 2 Young & Collier, 87; *Wellesley* v. *Duke, &c.*, 2 Russ., 28; *Hanley* v. *Gilbert*, Jacobs Chy., 354, 9 note 1, *Matter* of *Bostwick*, 4 Johns. Chy., 104; *Thompson* v. *Browne*, 4 Johns. Chy., 645; *Wilkes* v. *Rogers*, 6 Johns., 566; *Allen* v. *Coster*, 1 Beav., 202; *Keewick* v. *Langston*, 11 Sim., 291; *Matter of Estate of Mary England*, 4 Russ. & Myl., 499; *Ex parte Laken*, 4 Russ., 307; Smith's Man. of Eq., 434, 1st Am. Ed.; 2 Story's Eq. Jur., § 1354, *et seq.*

Nov. 16, 1872.

64] PRIDE v. BUBB.

[Law Reports, 7 Chancery Appeals, 64.]

[1870. P. 11.]

Married Woman — Power to Contract — Real Estate — Acknowledged Deed not in Form a Disposition by Wife — Reversion — 3 & 4 Will. 4, c. 74, s. 77.

By a deed of separation made between a husband and a wife and trustees, and duly acknowledged by the wife, it was agreed that the wife should hold all the real and personal estate of the husband and wife, or either of them in right of the wife, as her separate property, and should have power, by will, to devise or bequeath the same. The husband then purported to convey to a trustee all such real and personal estate, to be held upon corresponding trusts:—

Held, that though the wife did not expressly convey real estate vested in her, it was the intention of the deed that she should have power to dispose thereof as if she was unmarried, and accordingly that a certain estate of which a trustee was seised in trust for her separate use during her life, with remainder to herself in fee, passed by her will.

A married woman may pass her separate real estate by deed or will as a *feme sole*.

Decree of the Master of the Rolls affirmed.

UNDER the wills of *Richard Hill* and *Sarah Hill*, who had, under *Richard Hill's* will, powers of appointment, certain real estate in *Gloucestershire* was vested in trustees upon trust to pay

the rents to *Margaret Welch* wife of *William Welch*, for her [65 life to her separate use; and upon trust as to the remainder or reversion for *Margaret Welch* in fee, subject as to part to an estate tail in her daughter, who died in 1869, without issue. A deed of separation, dated the 30th of May, 1846, was made between *W. Welch*, of the first part, *Margaret Welch*, of the second part, *Henry Jones*, of the third part, and *John Andrews*, of the fourth part; and thereby, after reciting that in consequence of unhappy differences between the said *William Welch* and *Margaret*, his wife, it was lately agreed that they should live separate and apart from each other, and that certain lands should be demised as therein mentioned; and also that the said *Margaret Welch*, her heirs, executors, administrators, and assigns should have, hold, use, occupy, possess, and enjoy, and receive and retain all and singular the real and personal estate, property, and effects whatsoever of, in, and to which, or in respect whereof, the said *William Welch*, as the husband of the said *Margaret Welch*, or the said *William Welch* and *Margaret*, his wife, or either of them, in her right, were, or at any time or times should or might be or become, in any manner whatsoever, seised, possessed, interested, or entitled, and the rents, issues, and profits thereof respectively (subject, nevertheless, as to the hereditaments demised by the said indenture of lease to the term and estate thereby created), and all clothes, wearing apparel, ornaments, household furniture, chattels, and moneys whatsoever, then or thereafter in her possession, for the sole and separate use and benefit of the said *Margaret Welch*, her heirs, executors, administrators, and assigns, exclusively and independently of her said husband, and in all respects free from his debts, liabilities, engagements, control and interference. And after other recitals, it was witnessed that *William Welch* covenanted that *Margaret Welch* might thereafter live separate and apart from him as therein mentioned; and also that (subject, nevertheless, as to the hereditaments thereinafter charged with the payment of an annuity of £40, to the charge and power of distress thereinafter in that behalf contained, and as to the hereditaments demised by the said indenture of lease, to the term and estate thereby created), he, the said *William Welch*, his heirs, executors, and administrators would permit the said *Margaret Welch*, her heirs, executors, administrators, and assigns to have, *hold, oc- [66

cupy, use, possess, and enjoy, to and for her and their own separate use, and as her and their own separate property, and without being subject to the control, debts, interference, dispositions, or engagements of the said *William Welch*, his heirs, executors, or administrators; and either by any deed or deeds, or by her last will and testament in writing, or any writings in the nature of a will, or any codicil thereto to sell, give, devise, bequeath, or in any manner whatsoever dispose of all and singular the real and personal estate, property, and effects whatsoever of, in, or to which or in respect whereof the said *William Welch*, as the husband of the said *Margaret Welch*, or the said *William Welch* and *Margaret*, his wife, or either of them in her right, was or were, or at any time or times should or might be or become, in any manner whatsoever, seised, possessed, interested, or entitled; and also permit and suffer the said *Margaret Welch*, her heirs, executors, administrators and assigns, to receive and retain, to and for her and their own separate use, and as her and their own separate property, or expend without being subject to the control, debts, interference, dispositions, or engagements of the said *William Welch*, his heirs, executors, or administrators, all the rents, issues, and profits of all and singular such real estate, property, and effects whatsoever, as aforesaid. And it was further witnessed that the said *William Welch* and *Margaret Welch* did, and each of them did, thereby charge all the hereditaments whatsoever which were respectively devised and appointed by the will of the said *Sarah Hill* (except the said lands demised as aforesaid) with the payment to the said *John Andrews* and *Edward Bloxsome*, their executors, administrators, and assigns, during the life of the said *William Welch*, and in trust for him, the said *William Welch*, of an annuity or clear yearly sum of £40 by equal half-yearly payments; and provisions were made for securing the due payment of the annuity. And it was further witnessed that he, the said *William Welch*, did grant, bargain, sell, release, assign, transfer, set over, and confirm unto the said *Henry Jones*, his heirs, executors, administrators, and assigns, all and singular the real and personal estate, property, and effects whatsoever, of, in, or to which, or in respect whereof the said *William Welch*, as the husband of the said *Margaret Welch*, or the said *William Welch* and
67] *Margaret*, his wife, or *either of them in her right were or

was or at any time or times should or might be or become in any manner whatsoever seised, possessed, interested, or entitled (except the said hereditaments demised as aforesaid, and except such part of the said personal estate as had come to the actual possession of the said *William Welch*), and also all the rents, issues, and profits of all and singular such real and personal estate, property, and effects, whatsoever, as aforesaid, except as aforesaid, and also all and singular the personal estate of the said *Margaret Welch*, To have and to hold the premises unto and to the use of the said *Henry Jones*, his heirs, executors, and assigns, according to the nature thereof respectively (subject nevertheless as to the hereditaments thereinbefore charged with the payment of the said annuity of £40 to the same, and subject as to all the property to a provision thereinafter contained for the indemnity of the said *Henry Jones*, his heirs, executors, administrators, and assigns, against the debts of *Margaret Welch*), in trust to permit and suffer the said *Margaret Welch*, her heirs, executors, administrators, and assigns, to have, hold, receive, retain, use, enjoy, sell, give, devise, bequeath, dispose of, and expend the same to and for her and their own sole and separate use and benefit, exclusively and independently of the said *William Welch*, his heirs, executors, and administrators, and altogether free from his or their control, disposition, debts, interference, or engagements, as if she were unmarried and entitled to the same absolutely. The deed* contained many other provisions, but nowhere contained an express conveyance of real estate by *Margaret Welch*.

This deed was executed by all the parties, and was duly acknowledged by *Margaret Welch* before Commissioners.

Margaret Welch and her husband continued to live apart until her death in 1857. By her will, purporting to be made in execution of the powers given to her by the deed of separation, she devised all her estate, real and personal, to *Henry Jones*, subject to the payment of some legacies.

William Welch had died in 1853.

Henry Jones, on the death of *Margaret Welch*, entered into possession of the real estate which had passed under the wills of *Richard Hill* and *Sarah Hill*, and he having died his devisees continued in possession.

*The plaintiffs were the co-heirs of *Margaret Welch*, and [68

also of *Richard Hill*, and in March, 1869, filed the bill in this suit against the devisees of *Henry Jones*, and against the heirs or devisees of the trustees of *Richard Hill's* will and *Sarah Hill's* will, praying that the trusts of the wills of *Richard Hill* and *Sarah Hill* might be carried into execution, and that the trustees of the wills of *Richard Hill* and *Sarah Hill* might be declared trustees for the Plaintiffs, with consequent relief.

Lord *Romilly*, M.R., was of opinion that the intention of the parties was clear, and that the deed of separation gave to Mrs. *Welch* full power of disposing by will of the equitable reversion in fee simple expectant on the life estate which was given to her for her separate use; and his Lordship dismissed the bill with costs.

The Plaintiffs appealed.

The *Solicitor-General* (Mr. *Jessel*), Sir *Roundell Palmer*, Q.C., and Mr. *G. W. Collins*, for the Appellants:—

If the husband alone had power to alter the descent of the real estate, no doubt he has done so; but he had not power alone, and she, either by mistake or purposely, has not conveyed the estate as required by 3 & 4 Will. 4, c. 74, s. 77. *Crofts* v. *Middleton* (1) has no bearing on the question. Whatever could have been done by fine and recovery can be done by a deed acknowledged and inrolled, but that is all; and a fine and recovery to the uses of this deed would not have given this married woman power of disposition by will: *Dillon* v. *Grace* (2). Moreover this deed does not include separate estate: *Ramsden* v. *Smith* (3). As far as the married woman is concerned, the deed amounts to a contract only. Before the Act, a married woman could not contract as to her real estate, nor can she now, for she only takes power under the 77th section of 3 & 4 Will. 4, c. 74, which says nothing about a contract. The words "dispose of" cannot mean "contract." If a married woman was to be enabled to contract, why were copyholds excluded? As to the recitals, they are only of a past agreement, and, moreover, must be controlled by what follows.

69] *Mr. *Southgate*, Q.C., for a Defendant, took no part in the argument.

(1) 2 K. & J., 194; 8 D. M. & G., 192; 2 Jur. (N.S.), 528.
(2) 2 Sch. & Lef., 456. (3) 2 Drew., 298.

Sir *R. Baggallay*, Q.C., and Mr. *C. Hall*, for the principal Defendants, were not called upon.

LORD HATHERLEY, L.C.:—

It cannot, I apprehend, be now disputed that when a woman is the owner of real estate to her separate use, she is to all intents and purposes in the position of a *feme sole*, so as to be able to dispose of that estate by will or deed.

I think there were doubts existing in some part of the profession as to how far the doctrine with reference to the separate property of a married woman could be held to extend to a case where the heir was to be affected by any instrument, unless it was by some duly acknowledged conveyance in which the husband and wife had concurred, and how far the provisions, which were made simply for securing the wife against the interference of the husband, were or were not to be considered as provisions giving her power to dispose of the property as against her heir. These doubts have, however, been put an end to by decision.

Now the object of this deed is clearly to place this lady, with reference to all her real property, whatsoever and whensover acquired, in exactly the same position as if she had no husband at all; in other words, to give her the whole of the property to her separate use. If that had been so limited by a deed made anterior to her marriage, nobody disputes that the case would come precisely within the doctrine laid down by Lord *Westbury* (1), that she would hold as a *feme sole* and be able to make a will, the husband being placed out of the way. And I apprehend that by a deed duly executed, in which her husband concurred, the whole of her property might be placed in that position without any actual conveyance or assignment, and simply by the agreement of the husband, who is the only person concerned in the matter.

In this deed it is recited that for valuable consideration the husband had agreed with his wife to abandon all authority over her property, and to give her full power of disposition over it as if she were *sole. Then he covenants, and she makes [70 a declaration to the same effect; and as both present and future property was to be included, it is impossible to hold that this reversion expectant on her life estate is not to be considered as

(1) *Taylor* v. *Meads*, 34 L. J. (Ch.), 203.

within the meaning of the deed. I am quite satisfied that the observations in *Crofts* v. *Middleton* (1), with reference to the statute which enables the husband and wife to deal with her estate as they think fit, were intended to displace the notions which I had expressed as to the effect of a mere contract.

It seems to me that the lady has, by purchase, acquired to herself this right; and that the right having been once acquired, the husband is put out of the question altogether. And as regards any doubt as to the position of her future property, that doubt is solved when once it is determined that any woman holding an estate by gift to her separate use, although otherwise not able to bar the right of her heir, is put in a position in which she can deal with it unfettered by a marriage contract, and as any other person could deal with it.

I think the decision of the Master of the Rolls must be upheld as being right in principle, and that the appeal must be dismissed with costs.

Solicitor for the Plaintiff: Mr. *Gabriel.*
Solicitors for the Defendants: Messrs. *White & Sons.*

L.C. Dec. 6, 1871.

71 *GLEGG v. REES.

[Law Reports, 7 Chancery Appeals, 71.]

[1871 G. 97.]

Demurrer — Execution of Deed — Creditors' Deed — Voluntary Deed — Right of Trustee to Sue.

A bill stated that, by an indenture made between *A.*, of the first part, *B.*, of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed as creditors of *A.*, of the third part, *A.* assigned all his personal estate to *B.*, upon trusts for the creditors of *A.*:—

Held, on demurrer (affirming the decision of the Master of the Rolls), that this was not an averment of the execution of the deed by any of the creditors:

Held, that the deed nevertheless would operate as an assignment of the personal estate, so as to enable *B.* to maintain a suit against a trustee to whom cer-

(1) 8 D. M. & G., 192, 212.

tain personal estate had been assigned in trust for *A.*; and that the creditors need not be parties to the suit.

Decision of the Master of the Rolls reversed.

Garrard v. *Lord Lauderdale* (1) discussed.

THE bill in this case was filed by *J. Glegg* against *W. H. Rees*, and alleged that in 1859 a certain messuage at *Brixton* was assigned to the Defendant as a trustee for *W. Roupell*; and the bill stated that "the said *W. Roupell*, has been convicted of felony; but previously to such conviction, and by an indenture dated the 19th day of September, 1862, and made between the said *William Roupell*, of the first part, the Plaintiff, of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed and set (being respectively creditors of the said *William Roupell*), of the third part, the said *William Roupell* assigned all his personal estate and effects to the Plaintiff, upon the trusts therein mentioned in favor of the creditors of the said *William Roupell*. The said indenture was duly executed by the said *William Roupell* and the Plaintiff, and registered under the 194th section of the *Bankruptcy Act*, 1861; and the Plaintiff charges that the equitable estate of the said *William Roupell* in the said leasehold messuage and premises at *Brixton Hill* aforesaid *became, upon the [72 execution of the said indenture, and now is, vested in the Plaintiff upon the trusts of the said indenture."

And the bill prayed a declaration that the Defendant was a trustee of the messuage in question for the Plaintiff, and might be ordered to assign it to him.

To this bill the Defendant demurred for want of equity, and for want of parties; and the Master of the Rolls allowed the demurrer (2).

The plaintiff appealed.

(1) 2 Russ. & My., 451.

(2) July 4.

LORD ROMILLY, M.R., said he was of opinion that there was no sufficient averment that any creditor had executed this deed. No doubt, in general, the averment that an indenture was made between *A.*, *B.*, and *C.*, is a sufficient averment that they all executed the indenture; but an averment that a deed is made between *A.* and *B.* and *C.*, whose name was intended to be subscribed, is no averment of an execution by *C.*, as to which the averment was ambiguous; and that was the case here. If, however, it should appear that the deed was really executed by the creditors, leave to amend would be given.

But there was the further question for whom the plaintiff was trustee. Putting the Crown out of the question, the plaintiff was trustee for either *Roupell* or the creditors. If *Garrard* v.

The *Solicitor-General* (Mr. *Jessel*), and Mr. *C. Walker*, for the Appellant:—

We contend that the allegations in the bill as to the execution of the deed by the creditors are sufficient. If a deed is averred to be made, that involves execution: *Cabell* v. *Vaughan* (1). The signature of the creditors will be presumed: *Rist* v. *Hobson* (2). As the deed is registered, it cannot be revoked as 73] voluntary: *Smith* v. **Hurst* (3). At all events, the Plaintiff has sufficient interest to enable him to maintain this suit, and to recover the property assigned to him.

Mr. *Fooks*, Q.C., and Mr. *Holmes*, in support of the demurrer, denied that there was any allegation of the execution by the creditors; in fact, the inference was the other way, because it was alleged that *Roupell* and the Plaintiff had executed it. The deed was, therefore, voluntary and revocable; *Garrard* v. *Lord Lauderdale* (4); *Wallwyn* v. *Coutts* (5); *Ellison* v. *Ellison* (6). The deed being, therefore, revocable, the Plaintiff could not sue without making his *cestuis que trust* parties.

Dec. 6. LORD HATHERLEY, L.C.:—

The question raised on this demurrer depends upon a very short point.

The bill alleges that the Defendant is in possession of certain property, which he holds or did hold as trustee for *William* for *Roupell* only, and not for the creditors, in which case it was a question whether he would be entitled to sue the defendant, who was a trustee for either *Roupell* or the Crown.

As to whether the deed was valid as registered under the *Bankruptcy Act*, his Lordship reserved his judgment.

July 12.

HIS LORDSHIP expressed his opinion that the case did not turn upon the question whether deeds registered under sect. 194 of the *Bankruptcy Act*, 1861, could be enforced under the 197th

Lord Lauderdale (2 Russ. & My. 451), section, which would be difficult to de- was correct, the plaintiff was trustee cide: for his Lordship thought that the lapse of time since the deed was executed was a complete bar to its being treated as an act of bankruptcy, and left it a voluntary deed, subject to all the rules of a Court of Equity. His Lordship allowed the demurrer, and refused leave to amend.

(1) 1 Wms. Saund., 291.
(2) 1 S. & S., 543.
(3) 10 Hare, 30, 47.
(4) 3 Sim., 1; 2 Russ. & My., 451.
(5) 3 Mer., 707.
(6) 6 Ves., 656: 1 Wh. & T. L. C., 3d Ed., 223.

Roupell, who was convicted of felony; that *Roupell*, before this conviction, executed a deed, by which he conveyed all his personal estate to the Plaintiff, in trust for the creditors of *Roupell*; that the deed was executed by *Roupell* and the Plaintiff, and was registered. There is also an averment that the equitable estate of *Roupell* became, upon the execution of the deed, and now is, vested in the Plaintiff. Upon these averments the Master of the Rolls came to the conclusion, in which I agree, that there is no reason to presume the execution of the deed by any creditors as parties of the third part, although the bill does allege that the deed was registered under the *Bankruptcy Act*, and that the property of *Roupell* became vested in the Plaintiff as trustee. The allegation as to vesting would have no special effect beyond the statement of the terms of the deed, and would merely contradict any subsequent revocation of the deed, or that the deed had been set aside by any proceedings in bankruptcy or otherwise.

*The whole effect of the deed as stated is such that I must [74 assume that the personal estate of *Roupell* passed to the Plaintiff in trust, for the creditors. The case of *Garrard* v. *Lord Lauderdale* (1) has no application to this case. There the declaration of trust was held to be simply for the benefit of the assignor; and those who sought to take any benefit from the deed as a deed of trust for them were unable to do so. It seemed a deed for the benefit of creditors; yet when looked at it was no such thing, but merely an arrangement for the convenience of the assignor and assignee, the assignee undertaking the agency of the affairs of the assignor.

The authority of *Garrard* v. *Lord Lauderdale* has been questioned by Lord *St. Leonards* in *Simmonds* v. *Palles* (2), upon the facts. But upon principle there can be no doubt that, if the transaction is simply between the assignor and the assignee, no creditor can take advantage of the deed unless it has been communicated to him.

I will assume, however, that the deed is strictly within the principle of *Garrard* v. *Lord Lauderdale*, but still it is an assignment and vested the estate in the Plaintiff as assignee for the purpose which the assignor had in view. That being so, there is no possible reason why the Plaintiff should not sue any person

(1) 3 Sim., 1; 2 Russ. & My., 451. (2) 2 J. & Lat., 489, 495.

who holds any part of the property which has been assigned. The cases relating to voluntary settlements do not apply here. The principles were discussed in *Sloane* v. *Cadogan* (1), and it was clearly laid down in *Kekewich* v. *Manning* (2) and other cases, that a contract for a voluntary settlement cannot be enforced against the settlor. But if a voluntary settlor, for purposes of his own, wishes to part with his property, he can do so, and his purpose can be carried into effect by the assignee taking proceedings against any person in possession of the property. Why should not the assignee, as against third parties, perform the simple duties intrusted to him by the deed? As regards third parties, he may proceed against them, though not against the assignor, who may have changed his mind, and be able to avoid the arrangement.

This deed has vested in the Plaintiff such an interest as entitles 75] *him to call upon the Defendant for an answer. The Plaintiff does not sue as a creditor, and does not say that there were any debts; but even without debts, there would be a resulting trust for *Roupell* or the Crown, and the Plaintiff has a right to recover the property from wrong-doers.

There was also a demurrer for want of parties; but I think that the statute which enables trustees to sue third persons, without making their *cestuis que trust* parties, applies to that objection. If the case ever comes to a hearing, the Court will, no doubt, take care that those who are interested in *Roupell's* estate shall have sufficient notice. The bill does not seek administration of the estate, but merely to get in the property for the benefit of the *cestuis que trust*, whoever they may be.

The order of the Master of the Rolls must be reversed, and the demurrer overruled, with costs. No costs of the appeal.

Solicitors for the Plaintiff: Messrs. *Woodrooffe & Plaskit.*
Solicitor for the Defendant; Mr. *H. Earle.*

(1) Sug. V. & P., 11th Ed. App. No. 24. (2) 1 D. M. & G., 176.

L.C. and L.JJ. Nov. 15, 16, 22, 1871.

HUNTER v. WALTERS.

[1865 H. 318.]

CURLING v. WALTERS.

[1866 C. 23.]

DARNELL v. HUNTER.

[1866 D. 157.]

[Law Reports, 7 Chancery Appeals, 75.]

Mortgagees — Priority — Execution of Deed — Signing Receipt — Fraud — Notice — Defects in Plans — Attestation.

The solicitor of two mortgagees put up for sale by auction, without any authority, the mortgaged estate. He professed to have bought the estate, and prepared a conveyance which purported to be made by the second mortgagee under his power of sale. The mortgagees both executed the conveyance, and also signed indorsed receipts for money as paid to them, though no money was in fact paid to them. The solicitor took possession of the estate and continued to pay the interest to the mortgagees, and afterwards made an equitable mortgage of the estate, representing it to be his own and unincumbered. As to the first mortgagee, there was evidence that he was deceived by the solicitor; *as to the [76 second mortgagee, there was evidence that he trusted the solicitor implicitly. There were inconsistencies on the plans upon the different deeds, and the solicitor had attested some of the prior deeds:—

Held **(affirming the decree of *Malins*, V. C.), that, under the circumstances, the equitable mortgagee had priority over the second mortgagee:**

Held**, that the inconsistencies in the plans and the attestation by the solicitor did not put the equitable mortgagee on inquiry so as to fix him with constructive notice.**

In May, 1835, *J. Brandling* and *R. W. Brandling*, the then owners in fee of an estate consisting of seventy-five acres, and called the *Felling* estate, mortgaged it to *George Burdon* for £7200. In September, 1838, *John Brandling* covenanted to convey the *Felling* estate to *R. W. Brandling*, on payment by him of the £7200 and interest, the estate in fact belonging to *R. W. Brandling*. In October, 1838, 1A. 2R. 24P., part of the estate, was conveyed by *Burdon* to *J. Brandling* and *R. W. Brandling*, free from the mortgage debt.

By an indenture, dated the 26th of December, 1838, the mortgage to *Burdon* was transferred to a Mrs. *Hunter*, and the deeds were put in the possession of *Ralph Walters*, Mrs. *Hunter's* solicitor. In January, 1839, a second mortgage, being for £2000, was made by *R. W. Brandling* and *J. Brandling* to *W. N. Darnell*, another client of *Walters*, the power of redemption being given to *R. W. Brandling*. *Walters* attested the execution by the mortgagors of this deed. In 1840, about four acres of the estate was conveyed to *R. W. Brandling* discharged from the mortgages. The conveyances of this piece, and of the other small piece, were made in order to enable *R. W. Brandling* to dispose of the land for building purposes, and were both attested by *Walters*. In 1840, the two small pieces of land were equitably mortgaged to *W. N. Darnell* by way of further security, and the memorandum of mortgage was attested by *Walters*. In 1846 *R. W. Brandling* assigned his estate to trustees for the benefit of his creditors; and on the 30th of October, 1852, the trustees conveyed to *Darnell* the two small pieces of land, with the exception of certain parts thereof which had been sold for building.

In 1853 *Walters*, acting without any authority, put up the *Felling* estate, except the two pieces conveyed away, together with eight acres of leasehold land of his own, for sale by auction. The 77] *only particulars of sale were some which had been used on an attempted sale in 1844, and in the particulars the name of *Walters* appeared as a solicitor concerned. At this pretended auction the property was knocked down for £9050 to one *Dove*, from whom *Walters* professed to buy it at an advance of £150. An indenture was then prepared by *Walters*, and made to bear date the 1st of June, 1853, and the parties to it were *William Hunter* the executor and devisee of Mrs. *Hunter*, *W. N. Darnell*, *Dove*, and *Walters*. The indenture recited the two mortgages and the sale as made by *Darnell* under the power of sale in his mortgage deed; and all parties concurred in the usual manner in conveying to *Walters* the whole *Felling* estate, as described in the deed of 1835, the sum expressed to be paid to *W. Hunter* being £7200, that to *Darnell* £1850, and that to *Dove* £150. *W. Hunter*, *W. N. Darnell*, and *Dove*, all executed the deed, and on it were indorsed receipts in the usual forms for the £7200, the £1850, and the £150, signed by *Hunter*, *Darnell*, and *Dove*

respectively. No money was, in fact, paid to any of them by *Walters*. He took possession of the estate, and, until his death in 1865, paid interest to *Hunter* and *Darnell*, as if they still had charges on the estate.

But in 1862 *Walters* had applied to Mr. *Tatham*, a solicitor, partner in the firm of Messrs. *Fyson & Co.*, for a loan of £5000 on the security of the *Felling* estate, representing himself to be the absolute owner thereof. *Tatham* accordingly agreed to advance £5000 money belonging to a client, *W. Curling*. *Tatham* examined the title deeds, and made inquiries as to the value, and ultimately advanced the £5000 to *Walters* on the security of an indenture, dated the 11th of March, 1862, and made between *Walters*, of the one part, and *Curling*, of the other part, whereby *Walters* covenanted that the deeds mentioned in the schedule thereto should be a security for there payment of the £5000 and interest, and that *Walters* and all necessary parties would convey to *Curling* all the pieces of land and hereditaments comprised in the deeds and delineated on the annexed plan, by way of mortgage for securing the payment of the £5000 and interest; and that in the meantime the said hereditaments should remain charged with the payment of the £5000 and interest.

The schedule comprised the deeds of 1835, 1838, 1839, 1846, *1852, and 1853, but not the two conveyances of the small [78 pieces of land, nor the lease of the leaseholds which belonged to *Walters*; and the plan annexed was a copy of that annexed to the particulars of sale in 1844, the small pieces of land which had been conveyed to *R. W. Brandling* being excluded, but the leasehold being included.

The deeds were delivered to Messrs. *Fyson & Co.*, solicitors to Mr. *Curling*, and *Walters* paid interest on the £5000 until his death in 1865, when the fraud was discovered.

Thereupon three suits were instituted — one by *W. Hunter*, one by the executors of *Darnell*, who was dead, and one by Mrs. *Curling*, the executrix of *Curling*; Mrs. *Curling* claiming priority over *Hunter* and *Darnell*, and *Hunter* and *Darnell* claiming priority over Mrs. *Curling*.

As to the execution of the deed of 1853, *W. Hunter* stated that he had received a letter from *Walters*, dated the 31st of January, 1853, saying: "The *Felling* property has been sold,

and you will have to take this as notice to receive your principal and interest in six months from the 20th instant. It is possible the purchaser might retain the mortgage if you consented to take 4 per cent., but in the present state of the money market he will probably try to get it at 3½. I have made an offer to the purchaser to take the purchase off his hands at a given sum. Are you inclined to join in the speculation? I told you the particulars when we last met. I think it will pay in time, but I do not expect a quick return." *W. Hunter* further deposed that he understood that the mortgage was not to be paid off, and that he had signed the deed at *Walters'* request, who stated that it was a mere form, and had been executed by *Darnell*, that he never read the deed, and that he believed that the deed merely transferred the interest of the mortgagor to *Walters*, leaving the security as it was before.

Mr. *Darnell* was dead, and there was no evidence as to the manner in which he was induced to execute the deed of 1853. There was, however, evidence that he had great confidence in *Walters*, and was in the habit of executing deeds brought to him by *Walters* for execution.

Tatham stated that he found on the deeds a good title, and had no reason to suppose that *Walters* was not the unincum-
79] bered *owner of the *Felling* estate, and that, in his opinion, the plans of the estate corresponded, deduction being made for small portions which had been sold, and allowance for discrepancies which were apparently clerical errors.

The Vice-Chancellor *Malins* held that *Curling's* executrix had priority over *Hunter* and over *Darnell's* executors, and made a decree accordingly as reported (1), where the evidence of *Hunter* and of *Tatham* is more fully stated.

Darnell's executors appealed, but before the appeal was heard *Hunter* had bought up *Curling's* charge; and *Hunter* and Mrs. *Curling* now appeared by the same solicitor.

Mr. *Glasse*, Q.C., and Mr. *Rigby*, for the Appellants:—

We contend that under the circumstances, the deed of 1853 is not to be considered as *Darnell's* deed at all. He thought it a different deed, and did not know what he was signing. In such a state of things his signature is useless: *Vorley* v. *Cooke* (2),

(1) Law Rep., 11 Eq., 292. (2) 1 Giff., 230.

Lee v. *Angas* (1), and *Ogilvie* v. *Jeaffreson* (2). At law such a deed *would be inoperative: *Foster* v. *Mackinnon* (3). *Barnard* [80 v. *Hunter* (4) is exactly in point. It is clear that the deed is void, and that *Hunter* was deceived; if a man does not know what he is signing, his signature goes for nothing: *Cockell* v. *Taylor* (5); *Jones* v. *Thomas* (6). The mere execution of a deed is not conclusive on the person executing it, and if he has been defrauded in the matter equity will relieve him: *Beckett* v. *Cordley* (7); *Rice* v. *Rice* (8). *Walters* was the solicitor of *Darnell*, who was justified in leaving the business in the hands of *Walters*. In all such cases relief has been given: *Thorpe* v. *Holdsworth* (9); *Newton* v. *Newton* (10); *Eyre* v. *Burmester* (11); *Cory* v. *Eyre* (12).

(1) 1866. Nov. 20. V. C. STUART.

LEE v. ANGAS.

WILLIAM LEE, by his will, charged his estate with an annuity in favor of his wife, and after her death he gave his estate to his two daughters, as tenants in common. The widow and elder daughter, *H. Lee*, in 1842 and 1844, mortgaged their annuity and moiety for £1500. In December, 1857, *E. D. Conyers*, a solicitor, who had acted for the *Lees*, wrote to the younger daughter, *S. Lee*, stating that it was necessary to raise money on the estate to pay off the old mortgage, which he alleged, was called in, and that as he could not apply to her elder sister (who had married and gone abroad), he must have the deed signed by her, and he invited *S. Lee*, then residing at *Edinburgh*, to meet him at *York*, and he then told her that she would not be in any way liable, as it was merely a renewal. The deed was not read over, nor further explained to her. *S. Lee* accordingly executed the deed, which purported to be a mortgage of her moiety and of her mother's annuity, to a Mr. *Angas* for £2000, and she signed the indorsed receipt. Mrs. *Lee's* signature to the deed was a forgery. It was alleged that *Conyers*, who was *Angas's* solicitor received the money, and applied it for his own purposes. After the death of *Conyers*, the fraud and forgery were discovered, and this bill was filed by Mrs. *Lee* and Miss *S. Lee*, to have the deed of December, 1857, declared void, and cancelled.

Mr. *Malins*, Q.C., and Mr. *Fry*, for the Plaintiffs.

Mr. *Cole*, Q.C., and Mr. *E. E. Kay*, for the Defendants.

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(2) 2 Giff., 353.

SIR JOHN STUART, V.C., said it was clear that Mrs. *Lee's* signature was a forgery, and therefore as to her the deed must be set aside. After going through the evidence, His Honor said that Miss *S. Lee's* signature was procured by false representations, and therefore there must be a decree that the deed as to her also must be set aside, and the Defendants pay the costs of the suit.

The Defendants appealed, and the appeal was dismissed with costs by the Lords Justices on the 17th of March, 1868.

(3) Law Rep., 4 C. P., 704.
(4) 2 Jur. (N. S.), 1213.
(5) 15 Beav., 103.
(6) 11 W. R., 50.
(7) 1 Bro. C. C., 352.
(8) 2 Drew., 73.
(9) Law Rep., 7 Eq., 139.
(10) Law Rep., 4 Ch., 143.
(11) 10 H. L. C., 90.
(12) 1 D. J. & S., 149.

Moreover, what took place when *Curling* advanced his money was enough to have put his solicitor on his guard, and to have led him to make inquiries which would have disclosed the fraud. If he had compared the plans, he would have found a difference, and then he would have discovered that those lots had been sold, and that *Walters* was concerned as the solicitor. The whole fraud would then have been discovered: *Kennedy* v. *Green* (1). He would have seen that *Darnell* did not sell the building lots under his power of sale. The irregularities and imperfections in the deeds and plans ought to have created suspicion. If the deeds had been laid before counsel it would all have been found out. If *Curling's* solicitors had inquired into the circumstances of the sale they would have found out that it was conducted by *Walters*, and was a mere sham. At all events, we have a charge on the building lots, as they were not within *Darnell's* power of sale, and did not pass by the mortgage of 1862.

81] *Sir *Roundell Palmer*, Q.C., and Mr. *V. Hawkins*, for *Curling's* executrix; and

Mr. *Cotton*, Q.C., and Mr. *Fischer*, for *Hunter*, were not called upon.

Lord Hatherley, L.C.:—

This case now depends upon an extremely short question, namely, whether the mortgage given by *Walters* to *Curling* is an effectual security. Mr. *Curling* undoubtedly had not the slightest notice of any interest in any one except *Walters*, unless some constructive notice can be traced. [His Lordship then stated the facts of the case, observing that unfortunately it was extremely bare of evidence as to the execution of the deed by *Hunter*, and that as to *Darnell's* execution there was no evidence at all.] It is first said that we ought to regard the whole of these instruments as void, upon the principle of certain cases, such as *Kennedy* v. *Green* (2), where a representation has been made to a party to a deed that the instrument he is about to execute is an instrument of a totally different description from anything which it turns out to be. In such cases the

(1) 3 My. & K., 699. (2) 3 My. & K., 699.

person executing the instrument has not had his mind applied in any way to the words therein contained, but to a different state of things; for instance, when a person has signed a document, believing it to be a certificate, whilst it is, in fact, a bond. In the early books we find Lord *Coke* saying that if a man is blind or illiterate, and an instrument is read over to him falsely, then the instrument is void (1). This is a proposition which one would not be inclined to dispute when broadly laid down; and I do not wish to go into the shades of difference between the cases cited before us, some of which might stand upon very different principles. There are two cases, I think, before the Vice-Chancellor *Stuart*, where mortgages were fraudulently obtained, and could, therefore, when transferred, not stand as a security for more than was due. But I think that all those cases are so entirely beside the present case, that I do not wish to make any further observations upon them. The case of *Jones* v. *Thomas* (2) has nothing to do with the question whether a man can part with *his interest [82 by signing an instrument of which he does not know the effect.

I apprehend that if a man executes a solemn instrument by which he conveys an interest, and if he signs on the back a receipt for money — a document which, as the Vice-Chancellor observes, could not be mistaken—he cannot affect not to know what he was doing, and it is not enough for him afterwards to say that he thought it was only a form. That merely amounts to saying that a misrepresentation was made to him, under which he executed a deed; still the deed may have been exactly what he intended to execute, though he intended it to be used for a totally different purpose. But this does not affect the deed. The fraud of the person who used the deed for a different purpose does not make it less the deed of the person who executed it.

We have not in this case any evidence to bring it within the authorities which show that an instrument executed under certain circumstances of misrepresentation may be altogether void. [His Lordship then commented on the letter written by *Walters* to *Hunter*, and said that perhaps *Hunter* might have merely trusted *Walters* and have been defrauded by him.]

As regards the minor matters in this case, we were told that Mr. *Curling*, or his solicitor, Mr. *Tatham*, was guilty of consider-

(1) 2 Rep. 2 b, 9 a.

(2) 11 W. R., 50.

able negligence, which should deprive Mr. *Curling* of any advantages he might otherwise have obtained against the former mortgagees. First, it was said that they would have found, if they had compared the maps, discrepancies and defects in title to some of the properties, and would have found that there was more property than was comprised in their deed. I think the answer to that contention is, that they took a security upon whatever was in their deed and nothing else; and therefore, if they were not to have a security upon anything else, they need not trouble themselves about it; they did not inquire what had become of the other land, because it was no matter of theirs. As regards the few acres which were surplus, it seems to me doubtful whether the title deeds relating to that were included in those title deeds which had been laid before Mr. *Tatham*, but whatever is comprised in the title deeds, I take it they must have security upon; and as regards any minor pieces which are com-
83] prised in their deeds, but as to which *the anterior title has not been produced, they must take such title as they can get.

There is no such extravagant doctrine as that which has been contended for, that if a man, who is purchasing or taking a mortgage over a large estate as to which the title is furnished to him, chooses, as to a small portion, to be content with a short title, then as to all the rest of the estate he is to be affected with notice of something which he might have found out if he had investigated the earlier title to the small portion. That would be carrying the doctrine of constructive notice to a greater length than it has yet been carried.

It was also suggested that, if they had looked back to the deeds, they would have found Mr. *Walters*, the solicitor, attesting several of the deeds, but the attesting by no means shows that he was the solicitor; and, in the next place, it has never been the doctrine of this Court that you are obliged to look at the name of the attesting witness in such transactions to ascertain all his relations to the parties executing the deed. And no such proposition can be maintained.

Then it was said that there were conditions of sale, in which *Walters'* name appeared as the solicitor; but the utmost that can be said is, that you must take the legal and equitable title as you find it conveyed by the deeds; and if you find a sale recited, you are not bound to inquire into all the circumstances

of that sale; so if you find any other fact recited, you are not bound to inquire into all the attendant circumstances.

The utmost that can be maintained is, that you must take the consequences of the deduction of title into another person than yourself, and submit to any priority of title so obtained, and the doctrine cannot be put any higher.

I think that the Vice-Chancellor has come to a correct conclusion, and that the negligence of Mr. *Darnell* has caused him, notwithstanding any equities between himself and *Walters*, to be postponed to *Walters'* alienee, Mr. *Curling*.

SIR W. M. JAMES, L.J.:—

This case appears to me one of the simplest and plainest cases that were ever presented to a Court of Equity. It has been contended *on the part of the Appellants that the deed under [84 which Mrs. *Curling* claims title, that is to say, the deed of conveyance to Mr. *Walters*, was an absolute nullity; and this is based upon a statement that one of the mortgagees executed it upon the representation that it was a matter of form, and that it had been previously executed by Mr. *Darnell*.

With regard to Mr. *Darnell*, the other mortgagee, the only evidence is, that it is to be presumed that the deed was executed by him with the full confidence with which he was in the habit of executing all deeds placed before him by his own confidential solicitor, Mr. *Walters*.

To my mind it is almost ludicrous to contend, and it would be most injurious to hold, that a man executing a deed and signing a receipt as a matter of form should be able to say that it is a nullity. Many young men put their names to pieces of paper upon the representation that it is a mere matter of form, and that they will never hear any more of it. They learn by experience that the form is a painful substance. Many a trustee has endeavored in vain in this Court to escape from the consequences of his acts by saying, "I signed a deed, and I signed a receipt for money as a matter of conformity; which is another mode for saying, "I executed it as a matter of form." But those trustees have been made most painfully to learn that the instrument they have so signed will, with the consequences, follow them, and cause them to suffer for their negligence.

I am of opinion that such statements as those made to Mr.

Hunter—such confidence as that which is said to have been reposed by Mr. *Darnell*—are not circumstances which will afford the slightest ground for saying that a deed is void.

We have been referred to the cases of *Kennedy* v. *Green* (1) and *Vorley* v. *Cooke* (2), and other cases, as leading to the conclusion that the deed in this case is void, because certain deeds there were held to be void. As those cases have been cited, I think it right for myself to say that—not in the slightest degree disputing the perfect correctness of the particular conclusions which were arrived at in those cases—not in the slightest degree disputing the correctness of the equitable relief which was given there—I am not *prepared to concur in the conclusion that the facts in any one of those cases would have sustained at law a plea of *non est factum*; and if the contention of the Appellants be well founded, that the logical sequence from those cases is that the deed in this case is void, to my mind it would be a very apt and very useful illustration of the argument which is called the *reductio ad absurdum*.

85]

It is then said that, assuming the legal estate to have passed to *Walters*, so that he was capable of conveying something, and that he had some estate in him at the time when he executed the equitable mortgage to Mr. *Curling*, then there are two conflicting acts in this case; that there was an equity which still remained in *Darnell* prior in time, and therefore prior to the right in equity which Mr. *Curling* acquired by the execution of that deed. To my mind that question also is very simple. We have simply to consider whether, where an agent has committed a fraud, the principal who has trusted that agent, or another person who has dealt with him has to answer for the consequences of that fraud; whether, where a person has, either through fraud or otherwise, executed a deed, and signed a receipt containing an unmistakeable representation of a matter of fact, the person who has so executed the deed and signed the receipt is to suffer the loss arising from an undue use made of them, or another person, who has, in the ordinary course of business, without negligence or default of any kind, trusted to the documents which contained that representation.

I am of opinion that the rule of equity is the rule of common sense; that the principal must suffer for the fraud of his agent,

(1) 3 My. & K., 699. (2) 1 Giff., 230.

and not the stranger who is dealing with the agent; that the man who has made the representations, under whatever circumstances, must bear the consequences of those representations, and not the man who has trusted to the representations so made.

It was then contended that, assuming all this to be in favor of Mr. *Curling*, there was some degree of negligence on the part of Mr. *Curling's* solicitor, Mr. *Tatham*, which is to postpone the prior equity which otherwise Mr. *Curling* would have. The way in which that was put was this: it was said that if the solicitor had examined the deeds with very great accuracy—if he had minutely examined the maps—if he had minutely examined all the recitals *in all the deeds showing the devolution and [86 the deductions from the previous title—he would have been led to the discovery that there were certain inconsistencies in the deeds, that a man was professing to convey under a title which, when carefully examined, did not include the whole of the property; and that if he had gone further, and made further inquiries, it is possible or probable he might have learnt that there had been a sale by auction; and he would have learnt that, upon that sale by auction, certain particulars and conditions of sale were issued which were a mere repetition of particulars and conditions of sale that were used upon some former occasion; and that he would have found that a Mr. *Ralph Walters* was referred to as the person from whom information was to be obtained in respect of it; then he would have inferred from that that Mr. *Ralph Walters* was the solicitor for the parties, and he ought to have inferred that *Ralph Walters*, the alienee in the deed of conveyance, was the same person who had been the solicitor of some of the parties, and, finding that out, he would have been led to make further inquiries which would have resulted in the discovery of the fraud.

It appears to me that the proper place for such an argument as that would be in some satirical work ridiculing, by clever exaggerations, the doctrines of the Court of Equity, with respect to constructive notice. It is not, to my mind, a substantial argument, capable of being addressed with any effect to any Court whatever. I am of opinion, upon all these grounds, that this appeal totally fails, and that the decision of the Vice-Chancellor is right, and ought to be affirmed with costs.

SIR G. MELLISH, L. J.:—

The only part of this case upon which I wish to make any observations is, the question whether the legal estate in the property passed by the deed executed by Mr. *Hunter*, and the legal estate in the small portion of it which was in *Darnell*, passed by the same deed as having been executed by *Darnell*. Now, I am of opinion that there is evidence that both *Hunter* and *Darnell* were induced by the fraud of *Walters* to execute that deed; but the mere circumstance that they were induced to execute it by fraud does not make it a void deed in point of 87] law. But it is said that there is *something more than this, and that where a deed is procured by an actual false representation respecting the contents of the deed itself, or respecting the legal effect of the deed, there the deed is not only voidable, but is actually void at law, and, being void, the parties are in the same position as if it had never been executed at all. Thence, no doubt, it would follow, that Mr. *Walters* never got any estate in these premises at all, and therefore that an equitable mortgage by him would be altogether invalid.

Now, in my opinion, it is still a doubtful question at law, on which I do not wish to give any decisive opinion, whether, if there be a false representation respecting the contents of a deed, a person who is an educated person, and who might, by very simple means, have satisfied himself as to what the contents of the deed really were, may not, by executing it negligently be estopped as between himself and a person who innocently acts upon the faith of the deed being valid, and who accepts an estate under it. I do not think that the case of *Swan* v. *North British Australasian Company* (1) — a decision of which the learned Vice-Chancellor disapproves — is really a direct authority upon that question, because in that case a transfer of shares had been executed in blank; the person who executed it owned shares in two companies, and gave authority to the broker to fill them up with shares in one company, and the broker filled them up with shares in another company, which were afterwards transferred to an innocent person. There the Court said that the whole thing was a forgery, and that the negligence of the transferor in executing the deed in blank was not the real and

(1) 7 H. & N., 603.

proximate cause of the loss, which was the forgery of the broker in filling the deeds up with shares differing from those which he was authorized to fill them up with. That decision does not go to the extent of saying that if the broker had filled them up with the same shares which he was authorized to insert, and therefore had done what he was authorized to do, that then, because it was void at law from being executed in blank, nevertheless the principal might not have been estopped. Some of the Judges expressed an opinion that in no case where a deed is void in that way could there be an estoppel; but no conclusive opinion was given on that point, and I do not think it necessary for me in this case to give any opinion upon it, *because I quite agree with what has been said by the Lord [88 Chancellor and the Lord Justice, that in this case there is no evidence of any such misrepresentation as respects the contents of the deed and the legal effect of the deed, as would make it void on that ground.

Now, what is the case as respects *Hunter?* In the first place, when we are to depend solely on the evidence of the person himself to prove that there was a false representation made to him as to the contents of the deed at the time he executed it, we must look at that evidence with very considerable care before we act upon it so as to set a deed aside as against the person who has *bonâ fide* acted upon the faith of the deed being genuine. Even if we take what he says literally, there is, in my opinion, no sufficient evidence. He is informed by a letter written to him — the letter no doubt contains many false representations, but still he is informed — that the estate has been sold, that Mr. *Walters* himself may become the purchaser, and the object of the deed, he is informed, is the conveyance of the estate; he is also told that the purchaser, who in fact, is *Walters*, will be willing, if the interest is reduced, to keep the original mortgage; and when the deed is brought, it really is exactly the deed which was requisite to carry out the transaction, with this exception, that it does not contain the new mortgage. If there had been a new mortgage executed by a separate deed, the transaction would have been such as it was represented to be.

Then, when the deed is brought, Mr. *Walters* makes no statement as to what the contents of the deed are, but says it is a

mere form, and Mr. *Hunter* does not ask what the contents of the deed are. When a man knows that he is conveying or doing something with his estate, but does not ask what is the precise effect of the deed, because he is told it is a mere form, and has such confidence in his solicitor as to execute the deed in ignorance, then, in my opinion, a deed so executed, although it may be voidable upon the ground of fraud, is not a void deed.

But, as respects *Darnell's* execution, there is absolutely no evidence whatever as to how he came to execute it, though we have reason to suppose that he was induced to execute it by fraud, otherwise it is difficult to see why he should go on re-
89] ceiving the *interest on the mortgage; but what the fraud was we are wholly ignorant; and to infer, when the evidence is in that state, that the nature of the fraud was a misrepresentation respecting the contents of the deed, or the effect of the deed is, in my opinion, an inference that certainly no Court ought to draw.

I do not think it necessary to add anything upon the equitable grounds, though I conceive that the parties who signed the receipt are guilty of such negligence that they ought to be postponed in equity to Mr. *Curling*, who had a perfectly equitable title without any notice, and who advanced his money on the faith of the representation contained in that instrument.

Solicitor for Mr. *Darnell:* Mr. *J. Crowdy.*
Solicitors for the Defendants: Messrs. *Farrer, Ouvry, & Co.*

L.JJ. Nov. 21. 1871

90] *CARVER v. PINTO LEITE.

[Law Reports, 7 Chancery Appeals, 90.]

Practice — Production of Documents — Discovery.

Although, in considering whether the rule that a Defendant who submits to give discovery must make full discovery is to be applied, the Court does not in general weigh nicely the materiality of the discovery sought; still, if the discovery is such as might be used for purposes prejudicial to the Defendant irrespective

of the suit, the Court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing.

The Defendants in a suit to restrain infringement of trade-marks having sealed up certain parts of entries and letters admitted to relate to the matters in question in the cause, were ordered by the Duchy Court of *Lancaster* to unseal the names of customers, and of places, and the prices, forming parts of such entries, and to unseal the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters which were copied were sent, and the places to and from which the letters were sent, and the description of the marks to be placed, or which had been placed, on the goods referred to in such letters:—

Held, on appeal, that the Defendants ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, inasmuch as such discovery might be used in a manner prejudicial to the Defendants in their trade, and was not likely to assist the Plaintiffs in making out their case at the hearing; but that the order of the Vice Chancellor was in other respects right.

THIS was a motion by the Defendants by way of appeal from an order of the Vice-Chancellor of the Duchy Court of *Lancaster* as to the sealing up of parts of certain books and papers, the nature of which will be found stated in the judgment of the Vice-Chancellor.

The bill was filed to prevent the Defendants from impressing on goods exported by them to *Portugal* certain marks which the Plaintiffs alleged to be the Plaintiffs' trade-marks. On the 11th of April, 1870, an order was made for the Defendants to file an affidavit as to documents relating to the matters in question in the suit and to produce them, except such as they might by their affidavit object to produce, the Defendants to be at liberty to seal up such parts of the documents as did not relate to the matters in question in the suit.

The Defendants, by their affidavit, after setting out a schedule of documents, and objecting to produce those in the second part, stated as follows: "We have sealed up part of the documents *referred to in the first part of the said schedule, and [91 we swear positively that there is not contained in any or either of the portions so sealed up any memorandum, minute, or entry relating directly or indirectly to the matters in question in this cause, or any of them, or whereby or wherefrom, to the best of our knowledge and belief, the plaintiffs could gather any information or knowledge which would in anywise enable them to establish, or aid them in endeavoring to establish, the claims set up by them in their re-amended bill."

The Defendants having sealed up parts of various entries in their books, and of various letters, relating to the matters in question, the Plaintiffs applied for an order to oblige the Defendants to uncover them, and on the 22d of August, 1870, the District Registrar made an order that the Defendants should, within fourteen days after service, disclose the entirety of every entry in their books relating to the matters in the suit, and should accordingly unseal and uncover the names of manufacturers, customers, or other persons, and of places, and the prices, and other particulars forming part or parts of such entries in every case in which such names, prices, or particulars were then sealed up or covered. The Defendants applied to the Vice-Chancellor to discharge this order.

On the 24th of March, 1871, the Plaintiffs moved before the Vice-Chancellor that an order might be made directing the Defendants to unseal the whole of the books, letters, copies of letters, and documents produced by them, and which had been sealed up by them; or that the Defendants might be ordered to unseal those portions of the said letters and copies of letters which contained the names of the writers of the said letters, and of the persons to whom those copies were sent, and of the places to and from which the said letters were sent, and which contained a description of the stamp or mark to be placed on, or which had been placed on, the goods referred to in such letters; and that they might also be ordered to unseal those portions of the books which contained the names of the persons by whom the goods were ordered and to whom they were sent, and from whom they ordered them to be manufactured, and also which contained the stamps or marks to be placed upon the said goods, and all reference thereto.

92] *Before either of these applications to the Vice-Chancellor had been disposed of, the Defendants put in their answer, by which they denied the plaintiff's right to the marks as trade marks, and denied that any deception had been practised on the public. They further stated that they affixed the marks as agents for, and by the directions of, customers in *Portugal*, to whom they sold the goods.

On the 15th of April, 1871, the Vice-Chancellor made the following order upon the motion by the Plaintiffs:—"That the Defendants do, on or before the 9th of June next, unseal and

produce to the Plaintiffs the portions of the letters and copies of letters mentioned in their affidavit of documents which contain the names of the writers and of the persons to whom those copies were sent, and of the places from and to which the letters were sent, and which contained a description of the stamp or mark to be placed, or which had been placed, on the goods referred to in such letters."

On the same 15th of April, 1871, the Vice-Chancellor, on the application by the Defendants to discharge or vary the Registrar's order of the 22d of August, 1870, made an order directing it to be varied by striking out the word "manufacturers," but not further or otherwise (1).

(1) 1871, April 15.

Mr. WICKENS, V.C.:—

It is proper to state here, in the first instance, the view that I take of the existing practice as to the discovery of documents.

Before the alterations of the practice in 1852 there was a distinction between the right to a full answer and the right to discovery of documents, inasmuch as the Plaintiff was entitled to a full answer (in the absence of a plea or demurrer) to every question relevant to the statements in the bill, whereas the order for the production of documents was so far discretionary that the Court only made it if, on comparing the bill and answer, the Court thought that the Plaintiff had a *primâ facie* right to see them. This was sometimes said to involve a contradiction, since it would be idle to refuse production of a document which the plaintiff might require the Defendant to set out *verbatim*. Still, as a matter of fact, it was recognized in practice.

The alteration of practice in 1852 gave the Plaintiff a right to an order on summons for the production and inspection of documents before answer. But it was not, I conceive, intended to enlarge the Plaintiff's right to discovery by a side-wind. I apprehend that the Defendant is still entitled to resist the production of documents before answer, not only on the ground that he intends to plead, or plead and answer, but also on an allegation, supported by such evidence as the circumstances render necessary, that his answer, when filed, will displace the Plaintiff's right to production in whole or in part.

It seems to me that these principles must apply to the question of sealing up. That which a Defendant is entitled to seal up must be that which if on a separate paper he would not be bound to produce.

It was on these grounds that I postponed my decision on the Defendant's motion till I had seen the answer.

The Defendants deny the Plaintiffs' property in the marks, and any deception on the public effected by means of them. They say that they are mere agents obeying the instructions of customers in *Portugal*, and that the marks complained of are impressed on the covering of the goods by the Defendant's workmen and in their warehouse. And they deny any pecuniary interest which could lead them to perpetrate any such fraudulent acts as are complained of. The impression which the answer conveys is that of an unwillingness to disclose more than is absolutely necessary.

93] *The Defendants moved, by way of appeal, to discharge the first above-mentioned order of the 15th of April, 1871; so much of the second order of that date as directed the order of

But it is fair to observe that what the Defendants seek to guard is the secret of their principals rather than their own.

The documents to which this motion relates are entries in certain trade books described as order books, purchase books, and certain portions of a bundle of invoices. Each item in the order book runs across a double page, and is divided into seven parts. The first and seventh of these are only index numbers. The other five show, 1. The date of the order; 2. The description of the goods; 3. Who gave it; 4. Whence it came; and 5. To what manufacturer the execution of it was entrusted. Each item in the purchase book runs also across a double page, and after the date and the number of the order contains the following columns: Marks, of whom bought, Quantity, Price, Description, Value, Delivery, Terms, &c., and Instructions. The invoices are from stamp manufacturers who have supplied the stamps by which the marks are impressed on the goods.

The purchase and order books as produced are sealed up to an extent which cannot well be understood without inspection, but which certainly strikes me as unusual, and as calculated to make useless the discovery to be extracted from them. The order of the District Registrar, which the defendants seek to discharge, is dated the 22d of August, 1870, and directs that the Defendants shall within a limited time disclose the entirety of every entry in their books relating to the matters in this suit, and shall accordingly unseal and uncover the names of manufacturers, customers, or other persons, and of places, and the prices, or other particulars forming part or parts of such entries, in every case in which such names, prices, or particulars are now sealed up or covered.

It seems to me, after some consideration, that for the purpose of the issues which will have to be tried at the hearing, the names of the manufacturers of the goods can hardly be relevant. The other particulars are, I think, *primâ facie* such as the Plaintiff may reasonably require to see. The case against the defendants, it will be remembered, is in substance, and taking the bill and answer together, that they are the agents through whom certain Portuguese tradesmen acquire the means of supplanting the Plaintiffs in *Portugal*, selling goods of inferior quality with the marks which the Plaintiffs attach to goods of superior quality. The goods sold are long since dispersed and irrecoverable, and the only obvious test of their quality would be the price paid for them to the manufacturer. Nor can I doubt that the Plaintiffs are entitled to know the customers' names and the places to which they are sent, and, in fact, all that the purchase and order books show, except the manufacturers' names. I think also, though with more doubt, that the same principle would apply to the names and addresses of the manufacturers of the stamps as to the names of the manufacturers of the goods. It does not occur to me at present that these names or addresses are likely to be useful to the Plaintiffs for any legitimate purpose, and, on the whole, I am not prepared to order the Defendants to unseal them. I propose to vary the District Registrar's order by striking out the word "manufacturers," but no further.

With regard to the Plaintiffs' motion, I propose to order that the Defendants shall unseal the portions of the letters and copies of letters which contain the names of the writers of the letters, and of the persons to whom those copied

the 22d of *August, 1870, to be varied no further than [94 by striking out the word "manufacturers," and the whole of the order of the 22d of August, 1870.

Mr. *North*, for the appeal motion, referred to *Moore* v. *Craven*.(1)

were sent, and of the places from and to which the letters were sent, and which contained a description of the stamp or mark to be placed on, or which had been placed on, the goods referred to in such letters.

I am not quite sure that I am right in treating all the rest of the Plaintiffs' notice of motion as being either too large or superfluous. Probably, however, what I have said will sufficiently explain what I think the Plaintiffs' rights are.

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(1) 1870. Jan. 26. L. C. & L. J. G.

MOORE v. CRAVEN.

THIS was an appeal from a decision of Vice-Chancellor Sir *John Stuart*, allowing an exception to the answer of the Defendant.

The bill was filed by the assignees in bankruptcy of Messrs. *Dalby & Chapman*, a firm of wool top makers, alleging an agreement between the bankrupts and the Defendant, that the Defendant should, as agent for the bankrupts, sell such tops as the bankrupts might deliver to him; that he should be paid in respect of sales a commission of 1*s.* 4*d.* per lb. avoirdupois of tops sold by him; and that the Defendant should, in anticipation of sale, make advances to the bankrupts on the security of tops delivered to him.

The bill also alleged that tops to a large extent were delivered to the Defendant for sale by him as agent of the bankrupts; that accounts professing to show the dealings between the parties had been from time to time furnished by the Defendant; that the Plaintiffs had discovered that it was the practice of the Defendant, in breach of his duty as agent of the bankrupts, to sell the tops delivered to him at a higher price than the amount for which he gave credit in the accounts rendered by him, retaining for his own benefit the difference between the amount for which he gave credit in the accounts and the actual sums for which he sold the tops; that the Plaintiffs had also discovered that it was the practice of the Defendant, in further breach of his duty as such agent, to misrepresent to the bankrupts the weight of bags of tops delivered to him for sale as agent, and that the Defendant in fact represented the weight of tops sold by him to be less than their actual weight, and that in this manner the amount for which credit was given by the Defendant was still further reduced below the sums actually received by him; that correspondence had taken place with the view of adjusting the claims of the bankrupts' estate upon the Defendant, but that the Defendant refused to give any information with reference to the sales of tops effected by him, or to state the names and addresses of the persons to whom he sold the same, or to account for the profits made by him and retained for his own use.

A general account was prayed of all dealings and transactions between the Defendant and the bankrupts, and it was prayed that the Defendant might be charged upon taking the account with all profit made by him upon the sale of tops placed in his hands by the bankrupts for sale as their agent.

The Defendant was by the interroga-

95] *Mr. *Robinson*, *contrà*, referred to *Kerr* on Discovery (1).

Mr. *North*, in reply.

tories required among other things to state the names, addresses, and descriptions of the persons to whom he sold the tops, and the prices at which he sold them.

The Defendant by his answer denied that he had entered into the agreement alleged in the bill, and that he had ever sold tops as agent for the bankrupts.

He admitted that they had delivered to him tops which he had afterwards sold, but alleged that in every case he purchased the tops from the bankrupts before selling them, and that the prices mentioned in the accounts were the prices at which he purchased from the bankrupts.

He admitted that the prices obtained by him on sales of tops for the most part did exceed those given by him to the bankrupts for the same tops, and that if the Plaintiffs were to establish his liability to account to them for any excess of the sum received over those allowed by him, a balance would be payable by him to the Plaintiffs.

He refused to answer the interrogatories as to the prices for which, and the names and addresses, and descriptions of the persons to whom, he sold the tops, and his reasons for such refusal were stated in his answer as follows:—

"The discovery sought from me by the interrogatories filed for my examination as to the prices for which, and the names and addresses and descriptions of the persons to whom, the tops furnished to me by the said *Dalby & Chapman* were sold by me, would not, if I were to answer the said interrogatories fully as to such parts thereof as I have hereinbefore declined to answer, in any manner tend or assist to make out, and is not in any manner relevant to, the right of the Plaintiffs to demand, or my liability to render, such an account as aforesaid. The Plaintiffs are themselves top dealers, and they and also the said *Dalby & Chapman* are my rivals in trade, and the information which they seek from me by the interrogatories, or parts of interrogatories, which I have declined to answer, would give them an unfair advantage over me in my trade. Even if the Plaintiffs were to establish as against me their right to such an account as aforesaid (the possibility of which I deny), the discovery which they seek from me by the interrogatories, or part of interrogatories, which I have declined to answer would not in any manner tend or assist to establish their right to, or be in any manner relevant to, any decree which they could by any possibility obtain at the hearing of this cause."

The plaintiffs excepted to the answer for not setting forth the names, addresses, and descriptions of the persons to whom the tops furnished to the Defendant by the bankrupt were sold, but did not except on the ground of the refusal to set forth the prices realized.

The Vice-Chancellor allowed the exception, and the Defendant appealed.

Mr. *Dickinson*, Q.C., and Mr. *Rigby*, for the Appellant:—

The agency is clearly and circumstantially denied by the Defendant, and the Plaintiffs are not entitled to the discovery sought until the agency is proved. The only issue to be tried at the hearing is that of agency or no agency. If agency is established a decree to account would be a matter of course, and the Defendant admits that

(1) Page 167.

*Sir W. M. James, L.J.:— [96

In this case it appears to me that the Vice-Chancellor is substantially right. It is important to adhere to the rule of the *Court, that where the Defendant cannot protect himself [97 from giving discovery, there should be a full discovery of anything which is reasonably material to the Plaintiff's case at the hearing, and which may be produced without any overwhelming amount of injury to the Defendant. Generally speaking, him. To entitle a plaintiff to discovery he must show that it is material, and that it would of itself assist him towards a decree. It is not enough to say, as was said below, that the discovery might put the Plaintiff in the way of getting at facts, which might so assist him. To give a schedule of names, addresses, and descriptions of purchasers would not of itself in any manner assist the Plaintiffs in getting a decree and might be very injurious to the Defendant.

[They cited *Marquis of Donegal* v. *Stewart* (3 Ves. 446), *De La Rue* v. *Dickinson* (3 K. & J., 388), and referred to *Wigram* on Discovery (Pages 157, 158, 168, and 169).]

Mr. *Green*, Q.C., and Mr. *Ince*, for Plaintiffs, cited and relied upon *Howe* v. *M'Kernan* (30 Beav., 547), and argued that if they had the names and addresses of purchasers they might, by inquiry from them, or by inspection of invoices made out by the Defendant to them, ascertain that he actually sold as agent for the bankrupts, and thereby establish the Plaintiff's right to a decree, and that they might in like manner ascertain prices and weights at and according to which the defendant sold, and by means of such information make out such a case of fraud as would entitle them to open the accounts.

[They also cited *Kay* v. *Hargreaves* (14 L. T. (N. S.), 281).]

in that case a balance would be due from Lord Hatherley, L.C.:—

The court does not, when discovery is a matter of indifference to the Defendant, weigh in golden scales the question of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the Defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the Plaintiff obtains all the discovery which can be of use to him, on the other it is bound to protect the Defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the Plaintiff's pleadings, and to what will be in issue at the hearing. Here the question to be decided is, agency or no agency. If agency is proved, the Defendant admits that there would be a right to an account. The names and addresses of the purchasers, even if fully set out, would not in any manner tend to prove agency.

The interrogatory, therefore, is not material to the issue about to be tried, and the exception must be overruled with costs.

Sir G. M. Giffard, L.J., concurred.

Solicitors: Messrs. *Edwards, ton & Jaques*; Messrs. *Johnso. Weatheralls.*

as the Lord Chancellor, if I may venture to say so, well expressed it, the Court does not weigh in golden scales the materiality or immateriality of the discovery in considering whether the rule is to be applied — that he who discovers at all must discover fully; but, as he goes on to say, there are cases in which it is important that the Court should so weigh it, namely, cases in which the discovery is such as the Plaintiff, though failing at the hearing, may afterwards use in a way prejudicial to the Defendant. In such cases it is important to consider whether the discovery is material for the purpose of enabling the Plaintiff to establish his case at the hearing, or material only for the subsequent purposes of the suit, in case the Plaintiff should succeed. I am not at all disposed to grant discovery when I am satisfied that it is likely to be injurious to the Defendant, and am not satisfied that there is any real prospect of its being of material service to the Plaintiff at the hearing. Upon that ground I think the Vice-Chancellor's order in this case should be varied by not compelling the Defendants to discover the names of customers nor to discover the prices at which the goods were sold to them or bought from anybody else. Those are matters which only concern the Defendants' trade, and a discovery of which cannot, as it seems to me, in any way aid the Plaintiffs in establishing their title to the marks in question.

As to the other points to which attention has been drawn by
98] *Mr. *North*, I am not disposed to vary the Vice-Chancellor's order. In some cases the Defendants uncover part of a mark, admitting it to be part of one of the marks claimed by the Plaintiffs. I think that in such a case the Plaintiffs are entitled to see the whole of the mark, for the combination in which that part of a mark occurs may have a bearing upon the question of infringement or non-infringement. I think that the Plaintiffs also have a right to see what directions were given to the Defendants with respect to those marks. That may have a very considerable bearing, if not immediately on the relief, certainly upon the costs to be given at the hearing. Then the Defendant seeks to avoid discovery as to what the circumstances were under which the marks were put on the cloth. I cannot see what possible harm such discovery can do the Defendants if the Plaintiffs fail at the hearing, and it may materially help the Plaintiffs; and so with regard to what the marks were which

were actually put on, and what directions were given as to that. Then as to the names of the people to whom the goods were sent, it does seem to me that there can be no harm in the Defendant showing the names of the places in *Portugal* (he admits they all went there) to which the goods were sent. It is not like the case of a trade secret of any kind. That being so, it appears to me that our order should be to this effect:—

Direct that, notwithstanding the order of the District Registrar of the 22d of August, 1870, and the Vice-Chancellor's two orders of the 15th of April, 1871, the Defendants are not to be required to unseal any portion of any document containing the names or the initial letters of the names of purchasers or customers, or the names of any persons to or from whom any letters produced were written or received (other than letters written to or by *Arsenio Pinto Leite* (1), or the addresses by post (other than the names of towns) of such customers, purchasers, or persons, or any prices. And that with respect to any portions of books or letters or copies of letters which contain any description of the stamp or mark to be placed, or which had been placed, on the goods referred to in such books or letters, or copies of letters, the discovery by the *Defendants is to [99 be limited to such stamps or marks (other than the names of any customers or purchasers stamped or to be stamped on those goods) as may be referred to in any parts of letters, or copies of letters, or in any parts of such books, which have been or may be uncovered. And such discovery as the Defendants have to make under the said orders, having regard to this order, is to be made within seven days from the date hereof.

Sir G. Mellish, L.J., concurred.

Solicitors: Messrs. *Sale, Shipman, & Seddon, Manchester; J. Elliot Fox*, Agent for Messrs. *Earle, Son, Orford, & Co., Manchester.*

(1) A former partner of the Defendants.

L.JJ. Dec. 4, 1871.

Ellis v. Barker.

Law Reports, 7 Chancery Appeals, 104.

[1870 E. 21.]

Setting aside Deed — Trustee — Pressure.

A testator by his will desired his trustees to give up his farm to his nephew, the Plaintiff, if the landlord would accept him as tenant; and in that case he bequeathed to him the farming stock. He also gave some real property to the Plaintiff, and gave legacies and annuities to the Plaintiff's father, mother, and sisters, and other persons, including the trustees. One of the trustees of the will was steward to the landlord. There were hardly any assets to pay the legacies and annuities if the Plaintiff took the farming stock, upon which the trustees represented the case to the landlord, who left it to their decision whether the Plaintiff should be accepted as tenant. They accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies and annuities:—

Held (affirming the decision of the Master of the Rolls), that it was a breach of trust on the part of the trustees to endeavor to induce the landlord to refuse his consent to the Plaintiff having the tenancy, which the testator had by his will expressed his wish for him to have; and that the deed, having been obtained by means of that breach of trust, must be set aside; and that the trustees, having made the suit necessary, and hostilely contested the Plaintiff's right to relief, must pay the costs of the suit.

This was an appeal by the Defendants, the trustees of the will of *Francis Ellis*, from a decree of the Master of the Rolls.

By will, dated the 7th of June, 1865, the testator appointed *Barker* and *Godfrey* his trustees, and gave them each a legacy of £100. He gave his real estate to his nephew, the Plaintiff, in fee. He bequeathed to the superintendent in his shop a life annuity of £30, and to his housekeeper a legacy of £100, and to another person a life annuity of £20, and gave several small 105] legacies to *different persons. He then gave to the Plaintiff's father a life annuity of £100, and to the Plaintiff's mother, if she survived her husband, a life annuity of £50. Then, after reciting that he was tenant from year to year of a farm at *Flixborough*, under Sir *Robert Sheffield*, he declared it to be his wish and desire, and he authorized his trustees, to give up the tenancy in favor of the Plaintiff, if the landlord would accept him as tenant; and if he should be accepted as tenant, but not otherwise, the testator bequeathed to him the farming stock

and implements of husbandry upon the farm. He then gave his personal estate to *Barker* and *Godfrey* upon trust to convert it, and in the first place pay thereout his just debts, and funeral and testamentary expenses and legacies, and then invest sufficient funds for the payment of the annuities; and, subject thereto, invest £3500 upon the trusts therein mentioned for the benefit of the Plaintiff's seven sisters and their respective children; and he bequeathed the residue to the Plaintiff.

The testator died in December, 1865. At the time of his death the title-deeds of most of the estate devised to the Plaintiff were deposited with the testator's bankers as security for £2000. On investigating the state of the assets it was found that if, after this debt was paid off, the Plaintiff took the farming stock, there would be hardly anything left to pay legacies, including the £3500.

Barker, one of the trustees of the will, was also Sir *R. Sheffield's* agent. The trustees took the advice of counsel as to the effect of the will, and as to obtaining some concession from the Plaintiff. Counsel advised that, according to *Stone* v. *Barker* (1), *Smith* v. *Smith* (2), and *Eno* v. *Tatham* (3), the Plaintiff was entitled to have the devised estate exonerated out of the personalty, and warned the trustees against exerting any pressure upon the Plaintiff to make him give up his rights.

Barker, however, represented the matter to Sir *R. Sheffield*, and informed him that the testator had purported to make provision for the Plaintiff's father and mother, and their family; that there was not money for the purpose; that if the Plaintiff was accepted tenant, almost everything would go to him, but that if he was not accepted as tenant, the stock, crops, and tenant's rights would go among his father, mother, and sisters. Sir *Robert* thereupon said, *that unless the Plaintiff acted [106 rightly and honorably in the matter he would not accept him as tenant. *Barker* then, in March, 1866, wrote to the Plaintiff as follows: —

"Mr. *Godfrey* and myself intend to come over to-morrow to talk over what has been mentioned to you before, and to come to some conclusion thereon. Our proposal will be this — to offer to put you into full possession of the *Flixborough* farm just as it stands at present, together with £200 put in the bank for

(1) 1 Dr. & Sm., 212. (2) 3 Giff., 263. (3) D. J. & S., 443.

you, if you will give up your right to the property at *Brigg* and *Ferry*. I mentioned the affair to Sir *Robert*, and he states that he will do what the trustees think right. I have put it in writing, in order that you may have the opportunity of making up your mind before we come. I am satisfied that all depends upon what you will do, as if the land be kept a break-up at *Flixborough* will be sure to follow, which I should be very sorry for. I don't know that there is any necessity to state anything more at present."

On the following day *Barker* and *Godfrey* called on the Plaintiff, and he assented to their terms, and accordingly, by a deed of the 13th of March, 1866, the Plaintiff conveyed the real estate to *Barker* and *Godfrey*, upon trust to sell and to hold the proceeds upon the trusts declared by the testator's will concerning his personal estate, after payment of his debts and funeral and testamentary expenses. The Plaintiff had no independent advice as to this deed.

The Plaintiff was thereupon accepted as tenant, and the £200 was placed to his credit at the bank, and the stock, implements of husbandry, and crops were delivered to him.

By a further deed of the 5th of June, 1867, to which the plaintiff and his father, mother, and sisters were parties, it was agreed that the legacies and annuities to strangers in blood should be paid in full, and that the Plaintiff, his father, mother, and sisters, would accept, in full satisfaction of their demands, the balance which would remain in the hands of *Barker* and *Godfrey* after making such payment. The Plaintiff at the same time signed a memorandum, agreeing that he would make up the amount of the loss sustained by his father, mother, sisters, and nephews and nieces, before receiving anything from the residue. The trustees acted upon the above arrangement, and retained their own legacies.

In March, 1870, the Plaintiff filed his bill to set aside the 107] deeds, *as executed by him in ignorance of his rights, and under pressure from the trustees. The Master of the Rolls, on the 21st of June, 1871, made a decree declaring that the deeds were obtained by the trustees by coercion, and ought to be set aside, and ordering "that the same be set aside accordingly, so far as all future transactions thereunder are concerned." It was declared that *Barker* and *Godfrey* ought to refund their

legacies of £100 each, so far as they had been retained by them in excess of what they ought to have received if such deeds had not been executed. The Plaintiff was directed to pay the costs of the Defendants other than *Barker* and *Godfrey*, and add them to his own, and *Barker* and *Godfrey* were ordered to pay the whole.

The *Solicitor-General* (Mr. *Jessel*, Q.C.), Mr. *Fry*, Q.C., and Mr. *Bedwell*, for the Appellants, contended that the arrangement was a reasonable family arrangement, which put matters on the footing on which they would have stood if the Act 30 & 31 Vict. c. 69 had been passed a few years earlier, and that its having been brought about by pressure was not, according to the principles applicable to such arrangements, a ground for setting it aside, as the trustees had not promoted it for the purpose of securing an advantnge to themselves. They referred to *Hoghton* v. *Hoghton* (1), *Wycherley* v. *Wycherley* (2), *Westby* v. *Westby* (3).

Sir *R. Baggallay*, Q.C., and Mr. *Macnaghten*, for the Plaintiff; and Mr. *Coltman*, for other Respondents, were not called upon.

Sir W. M. James, L.J.:—

I am of opinion that the decree of the Master of the Rolls in this case is quite right, both as regards the relief granted and the costs. The testator, by his will, the meaning of which is beyond all reasonable doubt, appointed two trustees, one of whom was the steward of the testator's landlord. By his will, the testator shows a clear intention that his nephew, the Plaintiff, should have the testator's farm given up to him, and should be continued as tenant if the landlord would accept him, and in that event the testator bequeaths to him the stock on the farm. The testator also gives him two freehold properties. On investigating the state of the *assets, it was found that there [108 was not enough to pay the legacies and annuities, including those to the testator's father, mother, and sisters. The trustees thereupon came to the conclusion that the will was made by the testator in ignorance, not of the decision in *Eno* v. *Tatham* (4), but of the amount of his assets. They honestly believed that

(1) 15 Beav., 278.
(2) 2 Eden, 174, 177.
(3) 2 D. & War., 502.
(4) 3 D. J. & S., 443

he made it under a mistake. Still they were the trustees of that will, and their duty was to carry its trusts into effect impartially; they had no right to use the power given to them by their position as trustees, or any other power which they had, as a means of making a new will for the testator; for that is what their proceedings come to. They, however, thought it morally right to extort a concession from the Plaintiff. They consulted counsel, who gave them a cautious opinion, saying that they might properly represent the case to the Plaintiff to induce him to make some concession; but emphatically warning them against exerting any pressure. Notwithstanding this they went to the landlord — they say they only told him the state of things, and that may be so, still the fact remains that they, being trustees, went to the landlord — for the purpose of obtaining the power of holding out the threat contained in the letter addressed to the Plaintiff in March, 1866. It was a breach of duty on the part of the trustees to endeavor to induce the landlord to refuse his consent on any grounds to what the testator showed by his will that he wished and intended. Then they use the power thus obtained from the landlord by saying, "If you do not sign this deed" (a deed, it must be observed, going much further than what they had told the landlord), "we will break up your farm." To my mind, this was as clear a breach of trust as I have ever seen. Then, as to the defence that the trustees acted under the notion that they were doing what was morally right, they might have simply submitted the point to the Court, instead of which they have fought out the case, and involved the Plaintiff in a very expensive and hostile litigation. Having done this, they, like any other unsuccessful litigant, must indemnify the successful one against the costs.

Sir G. Mellish, L.J., concurred.

Solicitors: Messrs. *R. Lambert & Son*; Messrs. *Scott & Co.*

L.JJ. Dec. 9, 1871.

In re WALKER, a LUNATIC. [120

[7 Chancery Appeals, 120.]

Presumption of Death — Legatee — Statute of Limitations.

A testator gave a legacy to be equally divided, within twelve months, between the children of *W. P.* who should be living at his, the testator's, death, such sum to be raised out of the property thereinafter given to his executrix for life. He then gave to his executrix certain real and personal estate for her life, and after her death to the children of *W. P.* living at his, the testator's, death. At the testator's death in January, 1847, there were four children of *W. P.* living, but another, *J. T. P.*, had not been heard of since February, 1845, and nothing ever was heard of him afterwards. The executrix paid to the four children, who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, and in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of *the lunatic and the [121 children of *W. P.*, and the income was ordered to be applied for her benefit. In 1871 the four surviving children of *W. P.* and the administrator of *J. T. P.* petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of *J. T. P.*:—

Held, that, there being no proof that *J. T. P.* survived the testator, the share must be paid to the four children who were known to have survived him; that the manner in which the Court had dealt with the fund took the case out of the statute as to the principal, but that only six years' arrears of interest should be given.

JOSEPH TYNDALL PITT, by will dated the 4th of October, 1845, bequeathed to the children of his deceased brother, *William Pitt*, who should be living at his, the testator's, decease, £1000, to be divided among them, share and share alike; and he directed his executrix to raise it out of the property thereinafter given to her for life. He then gave property, amounting to several thousands of pounds, to *Martha Walker* for life, and after her death to the children of *William Pitt* who should be living at his, the testator's, decease, share and share alike, and appointed *Martha Walker* his executrix.

The testator died on the 24th of January, 1847. *William Pitt* had five children, one of whom, *Joseph Tyndall Pitt* the younger, was born in *Canada* in 1807. *J. T. Pitt* the younger, when grown up, worked at the lumbering trade in *Canada*, for some years, during which time he visited his father and his brother and sisters occasionally. From June, 1834, till 1845, he wan-

dered about the *United States*, during which period he wrote to some one or other of his father, brother, and sisters, about every eighteen months. The last of his letters was written from *New York* on the 17th of February, 1845, and was received in due course of post by his sister, to whom it was addressed. He was on the best of terms with his relatives, but none of them after this ever received any tidings of him, though inquiries were made and advertisements issued.

In 1848 *Martha Walker* divided four-fifths of the £1000 among the four children of *William Pitt* who were known to have survived the testator; but as nothing was known about *Joseph Tyndall Pitt* the younger, she did not raise the remaining fifth. In 1851 she was found lunatic by inquisition, and by an order made in 1852 the funds bequeathed to her for life, and out of 122] which the remaining *fifth of the £1000 was raiseable, were transferred into the lunacy to "The account of *Martha Walker* and the children of *William Pitt*;" and it was ordered that the dividends should be applied in part discharge of the allowance which had been ordered for the lunatic's maintenance.

The present Petition was presented by the three surviving children of *William Pitt*, by the representatives of another who had died since the death of the testator, and by the administrator of *Joseph Tyndall Pitt* the younger, praying for an account of what was due for principal and interest in respect of the unpaid part of the £1000; that the principal might be raised out of the funds given to *Martha Walker* for life, and the interest out of a fund to which she was absolutely entitled; and that the principal and interest might be divided between the three surviving children and the representatives of the one who had lately died; or if the Court did not think it right to make an order to that effect, then that they might be paid to the administrator of *Joseph Tyndall Pitt* the younger.

Mr. *Fry*, Q.C., and Mr. *Bardswell*, for the Petitioners.

Mr. *Dickinson*, Q.C., and Mr. *Method*, for the solicitor to the suitors' fund:—

The Petitioners must affirmatively prove their title to this share, which they have not done, there being no evidence

whether *J. T. Pitt* survived the testator or not: *In re Lewes' Trusts* (1); *Underwood* v. *Wing* (2). But if the title is proved sufficiently, it is barred by the *Statute of Limitations*, the lunatic having enjoyed the income of the fund ever since 1852.

Mr. *Millar*, for the next of kin.

Sir W. M. James, L.J.:—

I think it is clear that the unpaid fifth share of the legacy ought to be divided among such of the four children of *William Pitt*, who are known to have survived the testator, as are living, and the representatives of the one of those four children who has since died. There is no doubt that those four children were included in *the class of children of *William Pitt* living at [123 the testator's death.. There is a doubt whether *William Pitt's* fifth child was not included, but no evidence has been adduced, nor apparently can be obtained, to show that he was living at the testator's death, and so included in the class; and it lies upon those claiming under him to show that he was included. As to the defence founded on the *Statute of Limitations*, the answer, so far as relates to the principal, is, that the Court, acting on behalf of the lunatic, invested the fund to an account, the title of which showed that the children of *William Pitt* had an interest in it. As regards the income, however, I think that the defence must prevail, and that the Petitioners can only claim interest for six years. The Petitioners must bear their own costs; the costs of the Respondents must come out of the residue of the trust fund after paying to the Petitioners their share of the legacy; and the interest must come out of the funds to which the lunatic is absolutely entitled.

Sir G. Mellish, L.J., concurred.

Solicitors: Messrs. *Burton, Yeates, & Hart;* Messrs. *Johnson & Master.*

(1) Law Rep., 6 Ch., 356.

(2) 4 D. M. & G., 633; 8 H. L. C., 183.

As to presumption of death see Nepeau v. Knight, 2 Mees. & Welsh., 894; Lewis's Trust, 11 Eq.. 236; L. R. 6 Ch. App., 356; Montgomery v. Bevans, 4 Am. Law Times, U. S. Courts, Rep. 202. Burr v. Sims, 4 Wharton, 150; Bradley v. Bradley, 4 Wharton, 173.

L.JJ. Nov. 18, 1871.

FARHALL v. FARHALL.

[Law Reports, 7 Chancery Appeals, 123.]

[1867, F. 9.]

Creditor — Administration — Loan to Executor.

The executrix of a testator kept an executorship account with a bank, and having a power, under the will, to mortgage the real estate in aid of the personalty, she deposited with the bank the title-deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix, and the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against the testator's estate for the difference :—

Held **(reversing the decision of *Bacon*, V.C.), that they were not entitled to prove; for that a person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets.**

THIS was an appeal from a decision of Vice-Chancellor *Bacon* on an adjourned summons allowing a proof by the *London and County Banking Company*.

124] *The testator was a customer of the *London and County Bank*, and at his death, in December, 1871, was indebted to them, on an overdrawn account, to the amount of £732, for which they held the title-deeds of part of his estates. His widow was his executrix, and as such had, by his will, a power to charge his real estate in aid of his personal estate. After the testator's death she kept an account with the bank, headed "*Richard Farhall's* Executors' Account;" and the cheques which she drew on it were signed by her "*Mary Farhall*, for Executors of *Richard Farhall*." This account being overdrawn, Mrs. *Farhall* deposited the deeds of another part of the testator's estates as a security. The result was, that beside the £732 due from the testator at his death, the sum of £1861 14*s* 10*d*. became due to them on this later account. A decree for administration of the estate having been made in this suit, the bank claimed to prove for these sums, and by consent the estates, the title-deeds of which had been deposited, were ordered to be sold without prejudice to any question. On the 23d of

January, 1869, the claim of the bank to rank as incumbrancers on the proceeds of the sale was allowed by Vice-Chancellor *James* (1). After this the sales were completed, and the result was, that of the £1861 14*s.* 10*d.* a balance of £987 remained unpaid, for which the bank claimed to prove.

It appeared, from Mrs. *Farhall's* own affidavit, that, to a great extent, the moneys drawn out of the bank had been improperly applied; but it was not alleged that the bank had any notice of their not being required and applied for proper purposes.

Vice-Chancellor *Bacon* having allowed the claim (2), the Plaintiff appealed.

Mr. *Fry*, Q.C., and Mr. *Ince*, for the Appellant:—

An executor or administrator can pledge the assets, which is only a way of realizing them. But there is no authority for saying that he can pledge the credit of the estate generally, so as to make the person with whom he contracts a creditor of the estate. The two cases of *Secar* v. *Atkinson* (3), and *Rose* v. *Bowler* (4), are reconciled and explained in *Powell* v. *Graham* (5). The authorities, *as summed up in *Williams* on Executors (6), [125 support our contention, and *Ashby* v. *Ashby* (7) does not oppose it.

Mr. *Kay*, Q.C., and Mr. *Waller*, in support of the order:—

If this account had been in credit, the balance would have belonged to the testator's estate, and the bank, to their own loss, must have treated the account as an executorship account, and could not have set off the private debt of the executrix against it: *Ex parte Kingston* (8). The executrix, it is admitted, might have mortgaged to its utmost value every chattel forming part of the testator's estate, and, under this will, might have mortgaged the realty to any extent. Why, then, might she not create a general debt which would be less disadvantageous to the other creditors than the charges which she confessedly had power to make? The authorities referred to against us decide no more than this, that the judgment is to be *de bonis propriis*,

(1) Law Rep., 7 Eq., 286.
(2) Ibid. 12 Eq., 98.
(3) 1 H. Bl., 102.
(4) Ibid., 108.
(5) 7 Taunt., 581.
(6) 5th Ed., p. 1605; 6th Ed., p. 1636–8.
(7) 7 B. & C., 444.
(8) Law Rep. 6 Ch., 632.

there being enough to charge the executor personally. *Haynes* v. *Forshaw* (1) decides the present point in our favor. At the worst, we are entitled to stand in the place of any creditors who have been paid with this money.

SIR W. M. JAMES, L.J. :—

In this case it seems to me quite clear that there was no legal debt due from the estate to the bank. The executrix borrows money as executrix, says that she is executrix, and the bank debit her as executrix. To say that this charges the estate would give executors power to create debts to an unlimited extent. The executor has the power to realize the personal estate and to pledge specific assets, which is one mode of realizing them. Here the executor has also power to pledge the realty; and I have myself, by a former order, given the bankers the full benefit of the charge they had on part of the real estate, and held them not answerable for any devastavit the executrix committed as to the moneys raised by that mortgage. But to say that the executrix can, by borrowing money, enable the person who has lent it to stand as a creditor upon the estate, is 126] a position supported by no authority *and no principle. The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate.

It was urged for the Respondents that they were, at all events, creditors to the extent to which the money was applied in payment of debts, and we were referred to *Haynes* v. *Forshaw* (1). But when that case is fully considered, looking at the whole of it, and not merely at a passage picked out here and there, it only decides that an executor paying money for the estate is entitled to have credit for it, and, if necessary, to stand in the place of the person to whom he has paid it; and the learned Judge goes on to say, that perhaps anybody else who has paid money on behalf of the estate may be able to stand in the place of the creditor who has been paid. I can easily conceive many cases in which this would be just and equitable; but there is nothing in that case to support the contention that, if a man lends money to an executor, who says " I am going to pay debts

(1) 11 Hare, 93, 104.

with it," and the debts are not paid, the lender is to stand in the same place as if the debts had been paid with the money. The bankers, no doubt, took it for granted that the executrix was going to apply the whole of the money which she borrowed from them for the purposes of the estate; but she did not do so; and I am of opinion therefore that their claim fails.

SIR G. MELLISH, L.J.:—

I am of the same opinion. It appears to me to be settled law that, upon a contract of borrowing made by an executor after the death of the testator, the executor is only liable personally, and cannot be sued as executor so as to get execution against the assets of the testator. The authorities on the subject are summed up by Mr. Justice *Williams* (1): "It seems to have been once considered that wherever an action was brought against an executor or administrator, on promises said to have been made by him after the death of the testator or intestate, he was chargeable in his own right, and not in his representative capacity. The more modern authorities have, however, established *that in several instances the executor may be sued as ex- [127
ecutor on a promise made by him as executor, and that a declaration founded on such a promise will charge the Defendant no further than a declaration on a promise of the testator." But if we look through the different cases which follow that statement, it will be found that in every one the consideration for the promise of the executor was a contract or transaction with the testator. In *Dowse* v. *Coxe* (2) "the declaration stated that a cause depending in Chancery, in which *Thomas Biddle* was a party, was referred to arbitration, and that it was one of the terms of submission that in case either of the parties should die, the death was not to abate the reference." Then one of them died; the reference went on, and an award was made; and then a promise was made by the executor, as executor, to pay according to that award. That was a promise grounded on the reference which had been made in the lifetime of the testator, with an express engagement that his executors should be liable for the performance of the award. Then, in *Powell* v. *Graham* (3), "one count of the declaration stated a promise by the

(1) *Williams* on Executors, 6th Ed. p. 1636.
(2) 3 Bing., 20.
(3) 7 Taunt., 581.

testator in his lifetime, that in consideration the Plaintiff would enter into his service as a nurse and housekeeper, and would continue to serve him till his death, his executor should, after his decease, pay the Plaintiff £20; and then averred the Defendant's liability as executor, and that in consideration thereof the Defendant promised to pay the Plaintiff that sum." There the foundation of the promise by the executor was a previous contract made with the testator. Then, again, Mr. Justice *Williams* says: "So it should seem that a count, averring that the Defendant, as executor, was indebted to the Plaintiff for so much money paid by the Plaintiff to the use of the Defendant as executor, and that in consideration thereof the Defendant, as executor, promised to pay, charges the Defendant in his representative character only." Then he states the reason: "For instance, suppose two persons are jointly bound as sureties, and the one dies, and the survivor is sued, and obliged to pay the whole debt — in such case, if the deceased had been living, the survivor might have sued him for contribution in an action for money paid; and it should therefore seem that he is entitled to 128] sue the executor of the deceased for *money paid to his use as executor." That shows, no doubt, that a count for money paid for the use of an executor is a good count to charge him in his representative character, when the demand arises in consequence of a contract made with the testator. Then he goes on to say: "But a count, alleging that the Defendant, as executor, was indebted to the Plaintiff for so much money lent by the Plaintiff to the Defendant as executor, and that the Defendant, in consideration thereof, as executor, promised to pay, charges him personally; and the only possible judgment is *de bonis propriis*. And so it is of a count which charges that the Defendant, as executor, was indebted to the Plaintiff for money had and received by the Defendant, as executor, for the use of the Plaintiff." This I take to be the law; and although, as respects money had and received, Lord *Tenterden* and Mr. Justice *Bayley*, in the case of *Ashby* v. *Ashby* (1), said, that if the matter were *res nova*, they should have some doubt whether the Plaintiff might not elect to treat the receipt of the money as an act done by the Defendant in his character of executor, and though it is quite possible that an executor may receive money after

(1) 7 B. & C., 444.

the death of his testator, in consequence of some act done or contract made by the testator during his lifetime — in which case it certainly seems somewhat anomalous that the Plaintiff should not be able to recover it out of the assets — yet both those learned Judges considered the point to be settled by the authorities. Mr. Justice *Williams* then goes on to say: "So a count, alleging that the Defendant, as executor, was indebted to the Plaintiff for goods sold and delivered by the Plaintiff to the Defendant, as executor, at his request, or for work done and materials for the same used and provided by the Plaintiff for the Defendant, as executor, at his request, and that the Defendant as executor promised to pay, charges the Defendant in his personal, and not in his representative, character; for such a claim must necessarily be for debts due from the Defendant in his own right, as no goods can be sold to, or work performed for, another in his representative character: *Corner* v. *Shew* (1)." That case shows plainly that no contract can be made with an executor which will not charge him personally, but will charge him *de bonis testatoris*. There were counts for goods sold and delivered, and work and *labor done, not saying for what [129 purpose—in all probability it may have been for the funeral of the testator—yet it was held that on those counts the Defendant could only be charged personally, which shows how strict the law is.

Now, the only doubt that has been raised is from what is said by Mr. Justice *Bayley*, in the case of *Ashby* v. *Ashby* (2), which I cannot help thinking has been misunderstood by the Vice-Chancellor in this case; and I must also say it appears to me to have been misunderstood by the present Lord Chancellor, when Vice-Chancellor, in *Haynes* v. *Forshaw* (3), both of those learned Judges appearing to understand him to have laid down, that if an executor asked a banker or anybody else to pay money for the purpose of paying a debt of the testator, and he did pay the money, that then that would be money paid to his use as an executor. All that Mr. Justice *Bayley* was considering was, whether the count for money paid to the use of an executor, as executor, was a good count; and of course it was a good count if, by any possibility, money could be paid to the use of an executor as executor. I think that what he says is

(1) 3 M. & W., 350. (2) 7 B. & C., 444. (3) 11 Hare, 93.

explained by the instance which he puts afterwards, and that he did not mean to say that the money could be money paid to the use of the executor as executor, unless the matter arose out of a contract with, or something done by, the testator. And that is very clearly explained in the same case by Mr. Justice *Littledale*, who does not share the doubts of Lord *Tenterden* and Mr. Justice *Bayley*, but lays down very plainly what, I apprehend, is perfectly clear law, that the debts contracted by the executor cannot come into competition with the debts contracted by the testator in respect of their being paid out of the assets.

I am, therefore, of opinion that the claimants are not entitled to prove for this debt in competition with the creditors of the testator.

Solicitors: Messrs. *Stevens, Wilkinson, & Harries;* Messrs. *Stephens & Matthews.*

L.C. Dec. 4, 5, 1871.

130] *Upmann v. Elkan.

[1869 U. 24.]

[Law Reports, 7 Chancery Appeals, 130.]

Forged Trade-mark — Injunction — Agent — Costs — Costs of Respondent.

A firm of forwarding agents in *London* received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in *England*. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands.

Held (affirming the decree of the Master of the Rolls), on a bill for injunction filed by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit, but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs.

The Appellant gave notice to a respondent whose costs the Appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs:

Held, that the Respondent was not entitled to his costs of appearing on the appeal.

This was a suit against the holders of goods bearing a fraudulent trade-mark.

The Plaintiffs were cigar manufacturers in *Cuba*, and discovered in June, 1869, that several boxes of cigars, of inferior quality and not made by them, but bearing their brand, had been sent to the *Katharine Docks*, and was there entered in the name of Messrs. *Elkan*, who resided at *Hamburg*, but carried on in *London* the business of agents for forwarding goods consigned to them. These cigars had been consigned to them by Messrs. *Herold & Saenger*, of *Hamburg*, with directions to forward the contents to about twenty different persons in *England*. The Plaintiffs, on making this discovery, applied to Messrs. *Elkan*, who were up to that time, as it appeared on the evidence, not aware that the brands were false. There was some controversy as to what took place on the application by the Plaintiffs, but in the opinion of the Lord Chancellor Messrs. *Elkan* at once offered to give the name of the consignor, and offered either to send back the boxes of cigars or to erase the brands, but refused to disclose the names of the persons to whom the cigars were ordered to be delivered, stating that such information would be *useless. After the bill was filed, [131 however, they disclosed the names of the persons to whom the cigars were ordered to be delivered.

The Plaintiffs then amended the bill, and made all these persons Defendants. These Defendants all disclaimed any intention to infringe the trade-mark, and the bill was dismissed against all of them except Messrs. *Hamberg & Haar*, who were retained as Defendants.

The Master of the Rolls ordered the Plaintiffs to pay the costs of *Hamberg & Haar*, and also of the Dock Company, who had been made Defendants; and ordered that the consignors should be at liberty to intervene; and that if they did not, the brands of the Plaintiffs should be erased; and that the Plaintiffs should have a lien on the cigars for their costs; as reported (1).

The Plaintiffs appealed; and with the Petition of appeal their solicitors sent to the Defendants *Hamberg & Haar* a letter as follows:

"The appeal Petitions do not ask for any alteration in the orders made as to your costs; and as your costs will be paid before the Petitions are heard in all probability, it will be un-

(1) Law Rep., 12 Eq., 140.

necessary for you to attend by counsel on the hearing. If you are not paid before the hearing we undertake to pay your costs up to the time of the orders appealed from in order to save the expense of your appearing needlessly on the appeals."

Mr. *Eddis*, Q.C., and Mr. *E. Cutler*, for the Appellants :—

Messrs. *Elkan* were clearly more than mere carriers, and must have been aware of what the goods were. We say that we ought to have had an injunction and costs as against them : *Moet* v. *Couston* (1). Even if we do not get an injunction, we are entitled to relief as against these Defendants, and ought to have our costs. We contend that they did not, before the bill was filed, offer to give us all that we were entitled to.

Mr. *Roxburgh*, Q.C., and Mr. *Bardswell*, for Messrs. *Elkan* :—

Agents cannot possibly tell whether a brand is genuine, and we offered to do all that we could. If we did at first refuse to give the names of the persons to whom the cigars were to be
132] sent, it *turns out that the information would have been quite useless ; and we did afterwards give it. This is, in fact, an appeal for costs, as to which there is no fixed rule, and on which the Court has exercised its discretion : *Ainsworth* v. *Walmsley* (2).

Mr. *Terrell*, for *Hamberg & Haar*, asked for their costs of the appeal.

Mr. *Eddis*, in reply.

LORD HATHERLEY, L.C. :—

It has been argued that the Plaintiffs were not entitled to an injunction against the Defendants, who had been guilty of no offence, being merely carriers receiving goods, which, though fraudulently marked, were not for their own use, nor to be sold by them for their own benefit, but were received merely for the purpose of transmitting them to the persons to whom they were consigned.

(1) 33 Beav., 578. (2) Law Rep., 1 Eq.. 518.

I cannot conceive a doctrine more dangerous or mischievous, or more fatal to the authority of the Court with respect to trade-marks. If that argument prevailed, any persons being abroad, as was the case in this instance, and minded to commit frauds upon an English trade-mark, could easily do so by sending their different consignments together to persons in the position of the Defendants, who appear to be respectable agents and warehousemen, thereby committing an injury in a manner most convenient for themselves, and very mischievous to the person entitled to the benefit of the trade-marks.

The Master of the Rolls seems to have said — and I entirely agree with him — that there would be a right to an injunction if the defendants had not made an offer of redress when first the complaint was made; and this appeal is brought forward almost as an appeal for costs, to which, in fact, the argument has been mainly, if not entirely, addressed. If, however, I thought that the Plaintiffs had not, really and substantially, obtained all they had a right to obtain, or that they might be again exposed to be damnified in this same manner by the Defendants, I think it would have been *my duty to have [133 granted the injunction instead of taking the intermediate course which the Master of the Rolls has taken.

The Plaintiffs are the undoubted owners of the trade-mark, and have given sufficient evidence that these goods, which are impressed with the trade-mark, are not theirs. [His Lordship then commented on the evidence, as leading him to that conclusion.]

It was the business of Messrs. *Elkan*, the moment the complaint was made, to give all proper information. They say they were innocent, and the Master of the Rolls has held them to be innocent, and I hold them to be innocent of any part of this contrivance on the part of the consignor; but still it was their duty, from the first moment, to give all the information they possibly could, and to offer all redress, and the question is whether they did so. No doubt they declined giving the names of the persons to whom the goods were addressed, but they gave the name of the consignor, saying that the goods were addressed to about twenty different people, and that they did not at present see why they should give the names of these twenty people. That, I think, was an error on their part, but suppressing the names of

the consignees would be a matter of small importance if they did on that occasion offer to do one of two things, either to send the goods back, which would be no redress, because it would enable the consignors to repeat the fraud, or to erase the trade-mark altogether. If they made these offers before the bill was filed, it really seems to me that they, as innocent holders, did all that they need do. If the trade-mark was erased, the goods could not go with the trade-mark to the persons to whom they were directed, and the Plaintiffs could do nothing against parties who would not be properly parties to the suit. [His Lordship then commented on the evidence, and expressed his opinion that the Master of the Rolls was not wrong in coming to the conclusion that the evidence did prove that the offer was made before the bill was filed.]

As to the persons to whom the goods were to be sent, it is clear that there was a mistake in making them Defendants. There was no proof that they ordered the goods, and the goods never reached them in any way whatever. It seems that eighteen of them were dismissed, but as to the two who were retained, I cannot say that they were justified in appearing on 134] this appeal *when an offer had been made to pay them their costs then and there. The proper order is to dismiss the petition of appeal with costs as to the Defendants Messrs. *Elkan*, and without costs as to the other defendants.

Solicitors for the Plaintiffs: Messrs. *Lumley & Lumley*.
Solicitors for Messrs. *Elkan*: Messrs. *Le Riche & Son*.
Solicitors for Messrs. *Hamberg & Haar*: Mr. *S. Scott*.

L.C. Nov. 23, 24; Dec. 10, 15, 1871.

142] *Oriental Financial Corporation v. Overend, Gurney & Co.

[1868 O. 6.]

[Law Reports, 7 Chancery Appeals, 142.]

Principal and Surety — Giving Time.

The holder of a security who agrees with the principal to give time to the surety by so doing discharges the surety.

L.C. Oriental Financial Corporation v. Overend, Gurney, & Co. 1871

The holder of a security is, in dealing with the security, affected by knowledge acquired after taking the security as to which of the parties liable on the security is the principal and which is the surety.

A financial company, by agreement with an agent, accepted bills of exchange which were discounted for the agent by a discount company, the agent guaranteeing payment. The discount company were not at the time aware of the relations between the acceptors and the agent, but were informed before the bills matured that the agent was principal, and that the acceptors were sureties. After this the discount company agreed with the agent not to press the acceptors for payment until certain other bills became due:—

Held, that the acceptors were thereby discharged.

Decree of *Malins*, V.C., reversed.

Owen v. *Homan* (1) and *Ex parte Graham* (2) observed upon.

THIS was a suit by the *Oriental Financial Corporation* to restrain an action at law on certain bills of exchange for £10,000 which they had accepted; their ground being, first, that the bills had, in fact, been paid; and, secondly, that they were, to the knowledge of the holders, merely sureties, and that the holders had given time.

James McHenry, as agent of the *Atlantic and Great Western Railway Company*, in 1864 applied to the Plaintiffs, the *Oriental Financial Corporation*, to accept bills to the amount of £100,000 which the Plaintiffs agreed to do at a commission of 4 per cent. Accordingly bills to the amount of £100,000 were drawn on the Plaintiffs by one *Léon Lillo*, a banker at *Paris*. They were all dated in July, 1864, and were for twelve months. The Plaintiffs accepted the bills, which were handed over to *McHenry*, who proceeded to get them discounted, part of them being discounted by **Overend, Gurney, & Co.*, to whom [143 *McHenry* guaranteed payment. When the bills became due fresh bills for the same amount were drawn and accepted, similar in all respects to the first set, except which they were six months' bills, and that the name of the drawer was *Emile Deschamps*; and these bills were substituted for the others. This set of bills became due in January, 1866, and when they became due *McHenry* paid or provided for £82,000, leaving a balance of £18,000, of which the £10,000 in question in this suit was provided for by renewed bills for £2000, £2000, £3000, and £3000 respectively. They were for three months, and were dated the 2d of January, 1866, drawn by *Emile Deschamps* on the Plaintiffs, and accepted by the liquidators of the Plaintiffs,

(1) 3 Mac. & G., 378. (2) 5 D. M. & G., 356.

who had, on the 1st of November, 1865, passed a resolution for a voluntary winding-up. The bills were then handed over to *McHenry*, and were taken by *Overend, Gurney, & Co.*, in renewal of former bills to a similar amount; *McHenry* giving to *Overend, Gurney, & Co.*, a written guarantee that he would indemnify them for all loss which they might incur by so doing, and that in the event of the bills not being duly paid at maturity *McHenry* would pay the amount of the bills on demand; and he further gave the guarantee of the *Atlantic and Great Western Railway Company*.

The bills became due on the 6th of April, 1866, and were dishonored.

Overend, Gurney, & Co., had neither notice nor knowledge, at the time they received the bills, whether they were accepted by the Plaintiffs for valuable consideration or not, nor which of them, the Plaintiffs and *McHenry*, was in advance to the other, nor what was the state of accounts between them.

But on the 9th of April, 1866, Mr. *Farmer*, one of the solicitors of the Plaintiffs, called at the place of business of *Overend, Gurney, & Co.*, and there saw their managing director and their secretary, and stated to them that the bills had been accepted by the Plaintiffs for the benefit of *McHenry*, and that they treated him as primarily liable.

On the 27th of April, *McHenry* (who had other transactions with *Overend, Gurney, & Co.*, and had, on the 13th of March, deposited with them certain shares in the *Atlantic and Great Western Railway Company*, as to the object of which there was a 144] dispute) called *upon *Overend, Gurney, & Co.*, and proposed to them to discount certain other bills, and to apply the balance of £1000, which would arise from that transaction, in reduction of the £10,000, and gave them thirty-two bills of £1000 each drawn by *Léon Lillo* upon the *Bank of London*, and requested them not to press the Plaintiffs for payment of the bills. There was a dispute as to what was the actual agreement made on this occasion between *Overend, Gurney, & Co.* and *McHenry*; but in the opinion of the Lord Chancellor, *Overend, Gurney, & Co.* agreed to hold over the bills which the Plaintiffs had accepted, until the bills drawn by *Léon Lillo* came to maturity, which would not be for some months afterwards. At the same time a document was made out and assented to, which,

as the Defendants contended, was merely a statement of account as between *McHenry* and *Overend, Gurney, & Co.*, but, as the Plaintiffs contended, amounted to a discharge of the bills for £10,000.

In May, 1866, *Overend, Gurney, & Co.* stopped payment, and shortly afterwards went into liquidation. No further steps were taken in reference to the bills till the 5th of November, 1867, when one of the liquidators of the Plaintiffs received a letter from the liquidators of *Overend, Gurney, & Co.*, claiming the balance of £9000, together with interest on the bills. A correspondence thereupon took place, and on the 28th of February, 1868, *Overend, Gurney, & Co.* commenced an action against the Plaintiffs for £11,536 9*s.* 8*d.*, being the amount claimed for principal and interest on the four bills, together with a balance claimed upon a fifth bill.

The Plaintiffs then, on the 10th of March, 1868, filed their original bill in this suit against *Overend, Gurney, & Co.*, and *McHenry* praying a declaration that the Plaintiffs were not liable on the four bills for £10,000, and that the bills might be delivered up to be cancelled, and that the proceedings at law might be restrained. On the 23d of April, 1868, an order was made by arrangement restraining the action, on a submission by the Plaintiffs to abide by any order the Court might make for payment of whatever might be found due on the bills.

The suit then came on for hearing on motion for decree before the Vice-Chancellor *Malins*, who held that the Plaintiffs *were bound to pay the bills, and must pay the costs of [145 the suit (1).

The Plaintiffs appealed.

(1) 1871. June 10.

Sir R. Malins, V.C., after stating and discussing the facts of the case, continued:—

The Plaintiffs, then, rest their case on three points: first, security given to the Defendants on the 13th of March; secondly, that the transactions of the 13th of March and the 27th of April amounted to actual payment; and thirdly, if not, that the result of the transaction was to give time to the principal debtor, *McHenry*, which discharged the Plaintiffs who were sureties.

Assuming these bills to have been accommodation bills, and that *McHenry* was, as he is treated by the Plaintiffs, the principal debtor, there is no doubt as to the law of the case. It is settled by a long line of authorities that wherever there is a debt by a principal debtor and a surety, and the creditor enters into a binding contract to give time to the principal debtor without the consent of the surety, such giving of time to the principal is a discharge of the surety. It is not necessary to go minutely into the cases; *Davies* v.

146] *Sir *Roundell Palmer*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Jason Smith*, for the Appellants :—

Whether these were accommodation bills or not makes no difference, as the doctrines of principal and surety would ap-

Stainbank (6 D. M. & G. 679) was much relied upon by Sir *Roundell Palmer* in his argument, but I do not find in it any new law whatever. It was really a discussion whether the parties had given time or not, the law having long been clearly settled in the manner I have stated. The long judgments of the Lords Justices in that case, particularly of the Lord Justice *Knight Bruce*, only state the grounds on which he arrives at the conclusion that *Stainbanks*, who were the holders of the bills of exchange which were accepted by the Plaintiff in equity for the accommodation of other parties, had given the principal debtor time, and had thereby discharged the surety; which is the conclusion arrived at. *Pooley* v. *Harradine* (7 E. & B. 431) is a case of precisely the same nature, and only proceeded upon the general law. *Bailey* v. *Edwards* (4 B. & S. 761) is also a strong instance of the same kind. There a term of two years was given by the creditor, who accepted a deed which had been executed by the principal debtor; that was done without the consent of the surety, and it was held to be a discharge of the surety. *Ewin* v. *Lancaster* (13 W. R. 857) is another instance of the same kind. *Oakeley* v. *Pasheller* (4 Cl. & F. 207) is to the same effect. In all these cases time was given. But it is perfectly clear that in order to discharge by giving time there must be a positive contract to give time which is binding on the creditor. That is very distinctly laid down by Lord *Elden* in *Samuell* v. *Howarth* (3 Mer. 272), a celebrated case which, though not cited at the Bar, is cited in almost all the cases which have been referred to. I will read this rule as laid down by him (3 Mer. 278). "The rule is this: that if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety. That is, if time be given by virtue of a positive contract between the creditor and the principal—not where a creditor is merely inactive. And in the case put the surety is held to be discharged, for this reason: because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract."

Now, in the present case, it is not even alleged in the bill that there was any contract to give time to *McHenry*, and *McHenry* throughout the whole of the argument is treated as the principal debtor. The only agreement to give time which is in evidence is, that instead of giving time to *McHenry*, it being a great object plainly to *McHenry* that this company, which had accepted bills under an arrangement with him, should not be unduly pressed, he, for his own purposes, requested *Overend, Gurney & Co.*, not to press the Plaintiffs. [His Honor then referred to the evidence bearing upon this point, and continued:—] The evidence, in my opinion, entirely fails to prove that time was given to *McHenry*. It is not proved, or even alleged, that there was so much as a verbal promise to suspend the right of action against him; and even if a verbal promise had been alleged it would not have been binding.

In *Philpot* v. *Briant* (4 Bing., 717) it

ply in either *case. The money had been advanced to [147 *McHenry* by *Overend, Gurney, & Co.*, on the former bills for which the present bills were substituted. If *McHenry* had been a stranger, the agreement with him might not affect the rights

was decided that a verbal promise to give time, which was not binding, did not discharge the surety. [His Honor then read the marginal note and parts of the judgment of the Lord Chief Justice *Best* in that case (4 Bing., 720).] There must, therefore, be a binding contract, suspending the right of action.

The Defendants contended, first, that these bills were not, in the proper sense of the words, accommodation bills; secondly, that the transaction of the 27th of April was merely giving additional security, which is not a discharge of the surety; and thirdly, that the understanding that the bills should be held over was merely giving time to the surety, not to the principal debtor, which never discharges the surety. I am of opinion that the Defendants were right on all these points. I need not enter into it further, because I had occasion in *Ex parte Swan, In re Overend, Gurney, & Co.* (Law Rep. 6 Eq., 356), to consider what was an accommodation bill, and I came to the conclusion, for the reasons there stated, that where there is an account between the parties and bills are accepted, those were not strictly accommodation bills. I do not mean to decide the point, but I think it open to very grave doubt whether, considering these bills were accepted for value, 4 per cent. commission, and the other circumstances (I must assume as against the Plaintiffs that all the other arrangements were satisfactory to them), these bills can, in any sense of the word, fairly be held to be accommodation bills. However, I do not decide the case on those grounds.

As it is settled that an agreement to give time to the principal debtor, without the consent of the surety, is a discharge of the surety, so it is also equally clearly settled that giving additional security to the creditor by the principal, without the knowledge of the surety, is not a discharge. That was distinctly laid down by the Court of Queen's Bench in the case of *Pring* v. *Clarkson* (1 B. & C., 14), where Lord *Tenterden*, in giving judgment, says: "If time be given to the acceptor the other parties to the bill are discharged; but in no case has it been said that taking a collateral security from the acceptor shall have that effect. Here the second bill was nothing more than a collateral security." The second bill had been given by the surety without the knowledge of the principal.

In *Wyke* v. *Rogers* (1 D. M. & G., 408) Lord *St. Leonards* laid it down that taking a new promissory note from the principal does not discharge the surety, if the remedies against the surety are preserved. In *Twopenny* v. *Young* (3 B. & C. 208) it is also decided that the creditor taking from the principal additional security could not amount to a discharge. Therefore if any additional security was given by *McHenry* on the 27th of April, 1866, it is, upon the authorities, perfectly clear that taking that additional security, unaccompanied as it was by any binding contract to suspend the right of action against *McHenry*, could not have the effect of discharging the surety.

I also entirely concur with the opinion of many learned Judges—indeed, I may say, almost every Judge who has expressed an opinion on this subject—that this doctrine, of discharging the surety by giving time to the principal, is not a doctrine founded upon high principle. It is a doctrine which, as I have had an opportunity of learning from other Judges, is not generally ac

148] of the parties; but, in fact, he was *the principal, and known at the time to be such, which is quite sufficient to bring in the doctrine as to giving time: *Oakeley* v. *Pasheller* (1). Even at common law the Courts will look to the real relation between the parties: *Ewin* v. *Lancaster* (2). It is clear that the transaction, though nominally a giving time to the surety, was in effect a giving time to the principal, and by so doing the rights against the surety have been lost: *Davies* v. *Stainbank* (3); *Pooley* v. *Harradine* (4); *Bailey* v. *Edwards* (5). Moreover, we contend that, according to the arrangement of the 27th of April, these bills must be taken to have been discharged.

Mr. *Cole*, Q.C., and Mr. *Ferrers*, for *Overend, Gurney, & Co.*:—

We must look to the original loan and consider what were the position bills at all; secondly, that even if they had been, neither the arrangement of the 13th of March, 1866, nor that of the 27th of April, amounted to payment or giving time to the principal debtor. There was no contract whatever to give time to *McHenry*, if I am to treat him as the principal debtor. They were just as much at liberty on the 28th of April to sue him at law as if the statement of account of the 27th of April had not been made. It was, in my opinion, a mere statement of account; there was no time given and certainly no payment. On these grounds, therefore, I am of opinion that the Plaintiff's case has wholly failed, and that they are bound to pay the bills. There must, therefore, on the undertaking given on the 8th of April, 1868, be a reference to ascertain what is due for principal and interest on the bills, and there must be an order for the Plaintiffs to pay the amount of the bills under their undertaking; and of course they must pay the costs of the suit.

quiesced in. It has, in many of the judgments I have referred to, been lamented by the Judges that it had become a rule; but it has become so fixed a rule that it is impossible to interfere with it. Still I think it is equally clear that it is not a rule which is to be extended, and I entirely concur in the observation of Sir *Anthony Hart* in *Hulme* v. *Coles* (2 Sim. 12), that the principle of discharging a surety by giving time to the creditor is a refinement of a Court of Equity, and that he would not refine upon it.

Then the last point contended for by the Defendants was, that the principle does not apply to the case of giving time to a stranger to the bills, which was the position of *McHenry*. In support of this view *Fraser* v. *Jordan* (8 E. & B., 303) was cited, and I think it is a very material authority in the present case. [His Honor then stated the facts of that case, and read a portion of the judgment of Mr. Justice *Coleridge*.] The decision in that case was, therefore, that no arrangement with a stranger can have the effect of discharging the surety.

I am of opinion, on all these grounds, first, that these bills were not, in the proper sense of the term, accommoda-

(1) 4 Cl. & F., 207; 10 Bli., 548.
(2) 12 W. R., 857.
(3) 6 D. M. & G., 679.
(4) 7 E. & B., 431.
(5) 4 B. & S., 761.

the relations of the parties at that time; and it is clear that the Plaintiffs were treated as principals. The only notice which can bind them is the notice they had when they discounted the bills. The parties cannot, after getting the money, turn round and declare that the relation between them was different: *Harrison* v. *Courtauld* (1); *Manley* v. *Boycot* (2). Precisely the same point arose in *Ex parte Graham* (3) and in *Strong* v. *Foster* (4). *Pooley* v. *Harradine* merely followed former cases, and the *dicta* in *Bailey* v. *Edwards* were extrajudicial. Giving time to the surety is very different from giving time to the principal, and to hold that it amounts to the same thing would be an extension of the rule, which the Court would certainly not desire. The agreement to give time must be clearly proved: *Hulme* v. *Coles* (5); *Wyke* v. *Rogers* (6); *Ex parte Harvey* (7). The Plaintiffs have no *equity; if they have any case, it is for the [149 jury to consider in the action at law. It would be a great hardship on bill discounters if they were obliged to keep in mind all the equities of the parties to the bills, and could not deal as they choose with the bills they hold. Morever, no time was given to *McHenry*. What was to prevent the holders from suing him on his guarantee? If *McHenry* had indorsed the bills it would be different, but he is a mere stranger to the bills, and no agreement with him can affect the acceptors. In fact, neither *McHenry* nor the Plaintiffs are principals; the Railway Company are the principals.

Sir *Roundell Palmer*, in reply.

Dec. 15. LORD HATHERLEY, L.C.:—

In this case the Plaintiffs seek to be relieved from their liability on four bills of exchange amounting together to £10,000, upon two grounds: first, that *McHenry* to whom they gave the bills, and who procured them to be discounted by *Overend, Gurney, & Co.*, afterwards settled an account with *Overend, Gurney,*

(1) 3 B. & Ad., 36.
(2) 2 E. & B., 46.
(3) 5 D. M. & G., 356.
(4) 17 C. B., 201.
(5) 2 Sim., 12.
(6) 1 D.M. & G., 408.
(7) 4 Ibid., 881.

& Co., by which account *Overend, Gurney, & Co.* discharged and released everybody concerned from all liability upon the bills. Secondly, that even if that were not so, yet the Plaintiffs ought to be relieved upon the principle that time was given to *McHenry*, he being, to the knowledge of *Overend, Gurney, & Co.*, at the time when the arrangement was come to, primarily liable, and the Plaintiffs being liable only in the nature of his sureties.

Now, as regards the first ground, it appears to me clear that the bills were not paid or intended to be paid by the arrangement which was come to on the 27th of April, 1866.

As regards the circumstances connected with the bills, there seems to be, I think, no dispute of fact. [His Lordship then stated the facts of the case, and said that the agreement of the 27th of April between *Overend, Gurney, & Co.*, and *McHenry*, was, that during the currency of the bills drawn by *Lillo* they would hold over the bills accepted by the Plaintiffs which were then payable, and on which the guarantee of *McHenry* had accrued.]

Now, the real question is, whether this case falls within the 150] *authorities by which it has been long settled that, if time is given to the principal, the surety is discharged. It was suggested, and the learned Vice-Chancellor seems to have given some weight to the suggestion, that the basis on which this principle rests has never been fully understood, and that it would have been better had the Court *ab initio* decided, not that the surety should be absolutely released, but that he should be put to prove his injury, and be allowed damages for any injury he might have sustained, and that, therefore, the authorities which have proceeded upon this principle are in no way to be extended.

I do not feel myself at liberty to comment upon the propriety or impropriety of a principle which, more than half a century ago, was stated by Lord *Eldon* in *Samuell* v. *Howarth* (1) to have been long established, and which has been continually acted upon since that time, and is as well settled and established as any other principle of the Courts of Equity. I think that sometimes the cases are a little open to this observation, that they do not all of them, especially the later cases, clearly and distinctly show in what way the principle was established and brought to bear. But, undoubtedly, if we look to the earlier

(1) 3 Mer. 272.

cases, amongst which I might cite especially *Oakeley* v. *Pasheller* (1), the principle is laid down very clearly that if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal. It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period.

To show that this is the principle, we have only to refer to another class of cases, which, down to one very late case, clearly and distinctly established that it is competent to the creditors to reserve all their rights against the surety, in which case the surety is not discharged; and for this reason, that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but *subject to the proviso that the creditors shall [151 be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal. I say that this doctrine has been always recognized down to a late period, because Lord *Truro* threw some doubts upon it in the case of *Owen* v. *Homan* (2). But Lord *Cranworth*, in giving judgment in that case on appeal to the House of Lords (3), said there could be no doubt about the case before the House, and that he did not think he should have entered into any discussion of the case had it not been for the doubt thrown by Lord *Truro* upon the principle that you might retain the surety, if that formed part of the original contract as to not suing the principal; and Lord *Cranworth* said that he thought it right to protest against the doubt, because he thought the doctrine was perfectly clear and established.

Now, that being so, what was the condition of these parties? As I have said, it is plain that, as between *McHenry* and the Plaintiffs themselves, the Plaintiffs were secondarily liable, and *McHenry* was primarily liable; the Plaintiffs were only liable as sureties.

The learned Vice-Chancellor entered at some length into the

(1) 10 Bli. 548.

(2) 3 Mac. & G., 378; 15 Jur., 339.

(3) 4 H. L. C., 997; 17 Jur., 861.

question whether these were accommodation bills, but really I cannot quite follow the argument on that point, and I do not think it worth while to inquire whether bills are accommodation bills or not, where some commission is paid for the lending of the name. The substance of the case is, whether the relation of principal and surety subsisted, and I think, upon the whole, that it clearly did subsist.

The second point raised by the defendants was, that in effect this contract, which was entered into with *McHenry* was not a contract to give time to him, but was, in substance, a contract to give time to the surety; and that therefore this case did not come within the rule. But *McHenry* was at that time liable upon the bills; he had given a guarantee to pay them at maturity, and *Overend, Gurney, & Co.* had learned that the Plaintiffs were, as between themselves and *McHenry*, in fact the sureties. By agreeing, therefore, to hold over the bills they must have meant that they would not, during the currency of
152] *Lillo's* bills, place *McHenry* *in a position in which he could be sued. If they recovered or received the money and handed them the bills, they would obviously break their contract with *McHenry*. If the creditor agrees with the principal that he will not sue the sureties, the case is stronger than the usual case of an agreement to give time to the principal, which only involves by implication an engagement not to sue the surety. The position of the surety is changed, because it is one thing to lie by and wait before suing the principal, during which time the surety has a right to come in, discharge the debt, and immediately sue the principal, and another thing to engage positively with the principal that time shall be given to the surety, and so tie up your own hands from doing that which would throw the surety upon the principal. In fact the creditors had bound themselves not to receive payment from the sureties, because if they did receive payment they must give up the bills to the Plaintiffs, who were the sureties, and so allow them to proceed against *McHenry*, which would be contrary to the whole arrangement between them.

There remains one point upon which Mr. *Cole* pressed me very strongly. He argued that *Overend, Gurney, & Co.*, at the time when they took the bills, knew nothing of this, but believed the Plaintiffs to be the principals in every sense of the

word as between themselves and *McHenry*, and as between them and *Overend, Gurney, & Co.*; and he argued that their position could not be altered by their being afterwards informed of the existence of a different arrangement, and he cited an authority: *Ex parte Graham* (1). Now in that case the Lords Justices asked if there was any authority to show that knowledge acquired subsequently to the engagement would fix upon the creditors the obligation of seeing to the interests of the surety; and counsel citing none, it seems to have been held that in that case the discharge did not take place. But *Oakeley* v. *Pasheller* (2) is a precise and indirect authority upon the point, and being in the House of Lords is, of course, above that of this Court or that of the Lords Justices. [His Lordship then stated the facts of that case, and that there had been in that case a change of the positions of the principal and the surety, and that Sir *C. Oakeley* was held to have had notice of the change and to have *discharged the executors of the deceased partner, who [153 originally gave this bond to the creditors, and who had originally been the principal debtor, by entering into an engagement by which he gave, on two or three occasions, time to the remaining partners of the bank, who were originally sureties.]

That is a case distinctly and plainly in point: and I apprehend that the hardship involved in the principle is not so great as Mr. *Cole* represents. There is really no hardship in the case and that is one reason why I proceeded at some little length to show that the doctrine was not at all infringed upon by the right of the creditor to reserve his remedies against the surety. The Defendants here could have freed themselves from all difficulty whatever by reserving their rights against the Plaintiffs, and if that had been done, the case would have fallen within the principle of *Owen* v. *Homan* (3), and would have been free from all difficulty.

I confess, therefore, that it appears to me that this is a case plainly within the line of authorities, and that I am not advancing a single step beyond the clear principle which those authorities have established. I am obliged to reverse the decision to which the Vice-Chancellor came; and I must make a decl

(1) 5 D. M. & G., 356. (2) 10 Bli., 548; 4 Cl. & F., 207.
(3) 4 H. L. C., 997.

tion according to the prayer in the bill, and the Defendants must pay the costs of the suit, except, of course, of the appeal.

Solicitors for the Plaintiffs: Messrs. *Farmer & Robins.*
Solicitors for the Defendants: Messrs. *Markby & Tarry.*

The reader will find a somewhat elaborate note by the editor of the present volume in Clarke's Chancery Reports, edition 1869, pp. 72–4. See in addition to the cases there cited *Bank, &c.*, v. *Burns*, 2 Lansing, 52, affirmed N. Y. Court of Appeals, Sept. 5, 1871, Ex parte Mure, 2 Cox 63 and 74, note to Hoffman's edition.

L.JJ. Dec. 15, 1871.

161] **In re* Marseilles Extension Railway Company. *Ex parte* Credit Foncier and Mobilier of England.

[Law Reports, 7 Chancery Appeals, 161.]

Company — Misapplication of Funds by Directors — Borrowing Powers — Rigging the Market — Notice — Common Directors and Solicitor.

Two directors of *Company A.* were also directors of *Company B.*, and both companies employed the same solicitor. *Company A.* owed money to their contractor, which, however, was not payable immediately. The contractor had bought shares in the company and was pressed by the stock brokers for the money. *Company A.* agreed to advance him £7000, and borrowed the money from *Company B.* on the security of a mortgage. The loan was negotiated by one of the persons who was a director of both companies, and the solicitor who acted for both companies prepared the mortgage. *Company A.* had power under the articles to borrow money, but were not authorized to buy up their own shares. Both companies afterwards were wound up:—

Held (reversing the decision of *Malins*, V.C.), that *Company B.* were not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that they were consequently entitled to prove against the estate of *Company A.* under the winding-up.

This was an appeal from a decision of Vice-Chancellor *Malins* made in the winding-up of the *Marseilles Extension Railway and Land Company, Limited.*

The company was instituted for the purpose of obtaining a concession of land for the construction of a railway to *Marseilles*, and for acquiring land in connection with that object. The memorandum of association was dated the 29th of December, 1864.

One of the principal promoters of the company was Mr. *W. Bowles*, who entered into a contract to sell the company certain lands which he had purchased in *France*, and a concession from the French Government, and to construct their railway. By a subsequent agreement made on the 21st of November, 1865, the money payable by the company was fixed at £208,000, of which £120,000 were to be paid to *M. Talibot*, the owner of the lands, and £88,000 to *Bowles*, on the completion of the purchase, and he gave up all right to the contract for the railway. *Bowles* was accordingly credited with £88,000 in the books of the company.

*Previously to this date *Bowles* purchased shares of the [162 company to a large extent on the *Stock Exchange*, for which he was unable to pay on the day of settlement. Under these circumstances, he applied to the company for an advance on account of the money due to him. The directors, not being able to pay the money, and fearing that any failure on the part of *Bowles* would injure the company, applied to the *Crédit Foncier and Mobilier of England* to advance them £10,000.

Two of the directors of the *Marseilles Railway Company*, one of whom was Mr. *Newbon*, were at that time also directors of the *Crédit Foncier*, and Mr. *Heritage*, the solicitor of the *Marseilles Railway Company*, also acted as solicitor for the *Crédit Foncier*. Mr. *Newbon* and Mr. *Heritage* were deputed to negotiate the loan, and they accordingly attended at the board meeting of the *Crédit Foncier* on the 14th of November, 1865, for that purpose.

Mr. *Newbon* stated in his examination as follows: "The £7000 mentioned in the minutes of the 15th of November, 1865, as having been lent by the *Crédit Foncier*, was wanted to pay *Bowles* under his contract. We were advised that he was entitled to receive it. I made the proposal to the *Crédit Foncier* for the £7000. I made it to Mr. *Grant*, who was the managing director at that time. It was brought before the *Crédit Foncier* board. I was, no doubt, present. I do not remember who was present except Mr. *Grant* and myself. I told Mr. *Grant*, in his private room, what the money was wanted for. I have no doubt that Mr. *Grant* stated to the board what the money was wanted for, but I have no recollection of hearing him do so. I told Mr. *Grant* that *Bowles* had entered into engagements to pay money, which I believed he had no means of paying unless he received

some payments from the directors of the company under his contract. I told Mr. *Grant* that these engagements were to pay stock-brokers for shares in the company in question, which he (*Bowles*) had bought. The company was anxious to preserve its reputation on the *Stock-Exchange*, and therefore we were desirous of assisting *Bowles* to meet his engagements."

The directors of the *Crédit Foncier* consented to advance the money, and promissory notes were thereupon given by the *Marseilles Railway Company* for £10,000, and the repayment of the *loan was secured by a mortgage of certain lands which [163 the company had contracted to purchase at *Marseilles*. The mortgage was prepared by Mr. *Heritage*. Of the money so advanced £7000 was paid to *Bowles*, or to the brokers to whom he was liable, and £3000 was applied in meeting some bills on which the company were liable.

In August, 1866, the *Marseilles Extension Railway Company* was wound up voluntarily, and subsequently the *Crédit Foncier* was also wound up voluntarily.

The liquidators of the *Crédit Foncier* claimed to prove against the estate of the *Marseilles Railway Company*, for the amount advanced by them, the mortgage having turned out to be valueless. The claim was resisted by the liquidators of the *Marseilles Railway Company* so far as related to the £7000 advanced to *Bowles* on the ground that the money was borrowed by the directors for a purpose which was not warranted by the articles of association, namely, the purchase of shares in their own company, and that the directors of the *Crédit Foncier* had notice of the purpose for which the money was to be applied. The principal clauses of the articles of association bearing on the question were the following:—

Art. 23. "The directors may issue debentures, bonds, or obligations of the company, at any time, and in any form or manner, and for any amount which the directors may from time to time determine."

Art. 57. "The directors shall, subject to the powers of the general meetings, have the entire management of the company, and they shall have power to appoint and fix the duties and salaries of, and to remove, the manager, secretary, and all clerks, officers, and servants, and generally to do all acts, matters, and

things which are necessary or proper for carrying on the business of the company."

"(*a*) Without limiting the general authority hereby given to the directors, they shall have the following specific powers: viz., they may, for the purposes of the company, make, draw, accept or indorse any promissory note, bill of exchange, or other negotiable instrument, and may borrow on behalf of the company from any person or persons any sum or sums of money, either by way of mortgage of any of the property of the company, or on bonds, *debentures, or by receiving moneys [164 on deposit, or otherwise, as they may see fit."

The claim was brought before the Vice-Chancellor *Malins*, on an adjourned summons, when His Honor refused the claim, and the liquidator of the *Crédit Foncier* appealed from his decision (s).

(s) 1871. Nov. 6.

SIR R. MALINS, V.C., said that the question to be settled was, whether the money, which was advanced by the *Crédit Foncier*, was parted with under such circumstances as to constitute a debt against the *Marseilles Railway Company*.

With respect to borrowing money, different principles were applicable to public companies from those which applied to individuals. Shareholders in a company had certain protections thrown over them, and it did not follow that any sum borrowed by the directors constituted a debt against the shareholders. It must be borrowed for a purpose within the powers conferred upon the directors by their deed of settlement. There could be no doubt that these two companies were intimately connected with each other, and that the *Marseilles Railway Company* was an emanation from the *Crédit Foncier*. Although he could not, of course, import the evidence of one case into another, yet the transactions of these companies had been so often before him that it was well known that the object of the *Crédit Foncier and Mobilier*, presided over by *Albert Grant*, the great speculator of the age, was to bring out and foster other companies, and that they were not very scrupulous as to the means to which they resorted. The evidence in this case appeared to him conclusive that this company had fostered and encouraged the formation of the *Marseilles Railway Company*. Of the eight persons who signed the memorandum of association, four were directors of the *Crédit Foncier*. Mr. *Heritage* was the solicitor of both companies, and he could not hesitate in coming to the conclusion that every part of the transactions of the *Marseilles Railway Company* was known to, participated in, and promoted by the *Crédit Foncier*.

Then what was the course of proceeding? The company made a contract with Mr. *Talibot* for land in *France* for £120,000, which, however, they never obtained, as the land was taken by an incumbrancer, and then afterwards they professed to purchase the same land of *Bowles* for £208,000, crediting him with an advanced price of £88,000. He could only come to the conclusion that this was a simply colorable transaction, and that they credited him with this sum merely for the purpose of enabling the directors to carry out their schemes for misleading the public.

165] *Mr. *Glasse*, Q.C., Mr. *Cotton*, Q.C., and Mr. *Jackson*, for the Appellants:—

There is no evidence that the *Marseilles Company* had any illegal intention in borrowing the money. On the contrary, it is clear that the directors conceive that a large sum of money was really due to *Bowles*, although it might not have been payable immediately. But whatever their object may have been, clear from the evidence of the secretary that it would not have done for the *Crédit Foncier* to let the *Marseilles Railway Company* go down, because in that case they could not have floated the *Imperial Land Company*. Therefore, *Bowles* was sent into the market to buy shares in the *Marseilles Railway Company*, through, not one, but several brokers, and in so doing lost a large sum of money. How was this money to be provided? The *Marseilles Railway Company* had none, so they sent Mr. *Newbon*, who was a director of both companies, and Mr. *Heritage*, who was the solicitor for both companies, to the *Crédit Foncier*, and they told *Grant* the purpose for which the money was wanted, and obtained the loan from the board. Under these circumstances, he was asked, sitting as a jury, to come to the conclusion that *Albert Grant*, as representing the *Crédit Foncier*, believed that money was really due to *Bowles*, and that he did not know the purpose for which the money was wanted. He was perfectly satisfied, on the whole evidence, that *Albert Grant*, and *Newbon*, and all others associated with them, well knew that there was no debt due to *Bowles*, and that they knew that the money was wanted for "rigging the market," and that all had been done with their full consent and approbation for the purpose of carrying into effect their general purpose of fraud upon the public.

It had been urged upon him that the *Crédit Foncier* had no notice, because the knowledge possessed by *Newbon* and *Heritage* was not in the same transaction. But that was simply a dealing between borrower and lender; the same solicitor acted both for borrower and lender; and nothing could be clearer law in that Court than that where the same solicitor is employed by both borrower and lender, whatever knowledge he had of the circumstances of the borrower the lender was affected by that knowledge. Mr. *Heritage*, as the agent of both parties, had notice of these transactions, and Mr. *Newbon*, as a director of both companies, was party to them; his conduct as director of one company could not be separated from his conduct as director of the other. He considered that *Zulueta's Claim* (Law Rep. 5 Ch. 444) went the whole length of the present case. In that case Mr. *Henry* was affected with notice of the constitution of the company, and in the present case *Grant*, the chairman of the *Crédit Foncier*, knew as well as *Newbon* and *Heritage* that, although the directors of the *Marseilles Railway Company* were empowered to borrow money, they could not do so for the purpose of "rigging the market," or paying losses incurred in the process. On the whole, his Honor was of opinion that the whole transaction was colorable, was fraudulent—a transaction out of which no rights could arise, in which all the Court could do was to leave the parties where they were, and to refuse to interfere on one side or the other. He therefore, refused the claim, but without costs.

there is nothing to fix the *Crédit Foncier* with any notice of it. The *Marseilles Company* had clear powers to borrow money, and that was sufficient for the security of the lenders. The mere fact of the two companies having the same solicitor, or some common directors, does *not affect each company with [166 notice of everything that is done in the other: *In re European Bank* (1).

The Vice-Chancellor assumed that one company was an emanation from the other, and that they were conspiring together to delude the public, of which there is no evidence whatever.

Mr. *Higgins* and Mr. *Gill*, for the liquidators of the *Marseilles Extension Railway Company*:—

The transaction was a fraud upon the articles of the *Marseilles Company*, and was not binding upon the shareholders. No money was really due at that time to *Bowles*, and the evidence is conclusive that the directors advanced the money for the purpose of "rigging the market." It was a breach of trust on the part of the directors, of which the *Crédit Foncier* had notice when they lent the money. This is not an ordinary case of constructive notice, for Mr. *Newbon* actually informed *Grant* that the money was to be spent in paying for shares in the company, and the same solicitor was employed for both parties in the transaction. Whether one company was an emanation from the other or not, it is clear that they had common interests; and the directors of the *Crédit Foncier* believe that the ruin of the *Marseilles Company* would materially injure their company: *Balfour* v. *Ernest* (2); *Rolland* v. *Hart* (3); *Zuluetas Claim* (4).

Sir G. Mellish, L.J.:—

This is a claim on behalf of the *Crédit Foncier Company* to prove against the *Marseilles Extension Railway and Land Company* for £10,000, which was money lent, in the year 1865, on the security of promissory notes given by the *Marseilles Company* to the *Crédit Foncier*.

By the 57th clause of the articles of association of the *Marseilles Company* they had the most unlimited authority—of course

(1) Law Rep. 5 Ch., 358.
(2) 28 L. J. (C.P.), 170.
(3) Law Rep. 6 Ch., 678.
(4) Law Rep. 5 Ch., 444.

for the purposes of the company—to borrow money upon the security of bills of exchange and promissory notes. Then it is not denied that they did borrow money from the *Crédit Foncier Company* upon promissory notes, and therefore there is a per-
167] fectly plain **primâ facie* case. The defence is in substance that this money was really borrowed for a purpose that was *ultrà vires* — that either it was borrowed to "rig the market," or was borrowed for the purpose of buying up the shares of the company itself, there being no clause in the articles of association by which the *Marseilles Company* were allowed to buy up their own shares; and it is alleged that the *Crédit Foncier* had notice of it at the time the money was lent and the notes given. The witnesses called for the purpose of proving this defence were, Mr. *Newbon*, a director of both companies, and also the secretary. But Mr. *Newbon* does not really prove the case; for the result of his evidence is, that Mr. *Bowles*, the contractor, had a claim for a large sum of money against the company, and that it was extremely desirable that some of it should be advanced to him, because he had been speculating very largely in purchasing shares, and because if the money was not paid to enable those shares to be taken up, they would not get a settling day on the *Stock Exchange*, and the company would not be enabled to start. Although that was the way in which the money was to be expended, according to Mr. *Newbon's* statement, it was money which was due to *Bowles* on the existing contracts with the company. Then it is proved by Mr. *Newbon* that he and Mr. *Heritage*, the solicitor of both companies, went to the *Crédit Foncier* for the purpose of negotiating the loan; and he says that he told Mr. *Grant*, the managing director of the *Crédit Foncier*, those facts; that he told him they wanted to borrow the money for the purpose of making a payment to their contractor; that the money, he believed, was due from them, but the real object why they wanted to pay him the money was, that it would be prejudicial to the company (and he probably said also, to the *Crédit Foncier*, who were about to start another land company at *Marseilles*) if those shares were not taken up and the company was not started. This evidence certainly does not by itself establish the defence. The Vice-Chancellor appears to have come to the conclusion that all this was a sham, and that there was nothing due to *Bowles*; but

there is no proof of that in the evidence now before us, and the Vice-Chancellor appears to have drawn some inference in this case from the knowledge of the affairs of the *Crédit Foncier* which he had gained in previous cases. But we must decide this case on the *evidence that is before us. I do not [168 think that it is necessary to go into a minute examination of the deeds to see whether any money really was due to *Bowles*. It would rather appear that none was actually due to him at that time, although there were contracts on which money might afterwards become due, and this would rather appear to have been an advance to him in anticipation of such money. But in my opinion there is no evidence at all which could properly be left to a jury, if this were being tried at Common Law, that the *Crédit Foncier* had notice of any of these transactions, so as to make this loan on the security of these negotiable instruments in itself an invalid loan.

In the first place, it is said that the one company was an emanation from the other, and whatever was known to the one was known to the other. That is a general statement which it is difficult for me to follow; and it is, in point of fact, denied by the Appellants. The evidence, as far as there is any on the subject, is that the *Marseilles Company* was not a company started by the *Crédit Foncier*. It appears no doubt that many of the original promoters of the *Marseilles Company* had been directors in the *Crédit Foncier*, and that at the time when this transaction was going on there were two common directors, one of whom was Mr. *Newbon*. What does the circumstance of their being two common directors prove? I need hardly go into that, for Mr. *Newbon* distinctly denies that he had himself notice that the money was not due to *Bowles*, or that there was any impropriety in the transaction; and this is not contradicted. But even if that were not so, I cannot think that, because he was a common director to the two companies, we are on that account to say that the one company has necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company. It appears to me, that a director is simply a person appointed to act as one of a board, with power to bind the company when acting as a board, but having otherwise no power to bind them. And when he goes on behalf of the *Marseilles Company* to deal

with the *Crédit Foncier*, and the *Crédit Foncier* company negotiate with him and come to a certain resolution, it would be, as it appears so me, contrary to sound principle to hold that the *Crédit Foncier* had necessarily notice, or that their board had 169] notice, of every fact that *happened to be known to Mr. *Newbon*. That appears to me quite consistent with what was laid down by Lord Justice *Giffard* in *Zulueta's Claim* (1) which has been referred to.

Then it is said that there was a common solicitor, and therefore everything known to one company must have been known to the other. Mr. *Heritage* is not called, and all that is said is, that he was the solicitor of both companies and used to attend their boards; but what as matter of fact he actually knew, or what conclusion he drew from what he knew, we have no evidence. It appears to me it would be going very far indeed to say, not that the *Crédit Foncier* had notice of any facts which had happened, but that they were bound by any knowledge that Mr. *Heritage* might have of an intention on the part of the *Marseilles Company* to expend the money which they were professedly borrowing for a purpose quite legitimate for some other purpose. I cannot see that there is any evidence at all when the loan was agreed upon that Mr. *Heritage* had begun to act or was acting as solicitor for the *Crédit Foncier*. He went with Mr. *Newbon* to negotiate the loan. That loan was only negotiated with Mr. *Grant*, the managing director of the *Crédit Foncier*, and it was brought before the board of the *Crédit Foncier*, and the board as a board came to the resolution to make the loan, not, as far as appears, consulting Mr. *Heritage*, or employing him at all as their solicitor in the matter, but acting as commercial men upon their own discretion. No doubt it may have been part of the terms that there should be a mortgage, and Mr. *Heritage* may have been employed as their solicitor to draw up the mortgage deed. But I cannot think that is sufficient to affect the *Crédit Foncier* with notice of any improper mode in which this money was to be expended, even if Mr. *Heritage* had, which I cannot see that there is any evidence that he had, notice that it was to be expended for an improper purpose.

After all, the real question is, which of two innocent sets of shareholders is to bear this loss? It appears to me that if the

(1) Law Rep., 5 Ch., 444.

directors of the *Marseilles Company* have been guilty of an improper application of the funds of the *Marseilles Company* it would be more just that the shareholders of the *Marseilles Company*, whose directors improperly applied this money, should bear the loss, than the innocent *shareholders of the [170 *Crédit Foncier*, whose directors appear to have done what it was a perfectly legitimate thing for them to do; it being a part of their business to lend money, and the other company having power to borrow it.

It appears to me that this claim is made out, and that the order of the Vice-Chancellor should be reversed, and an order made allowing the claim, with costs, in the Court below.

Sir W. M. James, L.J.:

I am of the same opinion. I desire only to add this: I cannot understand how a director of a company going to borrow money from another company can put the company from whom he borrows it in any different position from that in which a joint stock bank would be placed by a director of it asking a loan for himself. Is it to be imputed to the banking company that they have knowledge of everything the director knows about his own private affairs? Such a proposition seems to be most unreasonable.

Solicitor for the Appellants: Mr. *Heritage.*
Solicitors for the Respondents: Messrs *Hathaway & Andrews.*

L.JJ., Dec. 16, 1871.

In re Kilvert's Trusts.

[Law Reports, 7 Chancery Appeals, 170.]

Will—Latent Ambiguity—Parol Evidence—Imperfect Description—Legacy to Charitable Society, or for Charitable Object.

A testatrix, by will made in 1868, gave a legacy to "the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity." Two societies made a claim. One had been founded in 1777 for the relief of the

widows and orphans of the clergy of the diocese, at which time the diocese comprised only the Archdeaconry of *Worcester*. In 1837 the Archdeaconry of *Coventry* was added to the diocese, and in 1848 the *Worcester* society altered its title, so as to show that its operations were restricted to the Archdeaconry of *Worcester*. The other society had been founded in 1777 for the relief of widows and orphans of clergy in the Archdeaconry of *Coventry*. The father of the testatrix had been a subscriber to the *Worcester* society till his death in 1817. His widow had continued the subscription till her death in 1860. And the testatrix 171] had continued it from *that time at an increased rate; but it did not appear that the testatrix, or any of her family, had subscribed to the *Coventry* society;—

Held, by *Malins*, V.C., that the gift was to be treated as a gift to an object, not to a particular society, and must be apportioned between the two societies:

Held, on appeal, that the gift was a gift to a particular society, with a slight inaccuracy of description, and that the *Worcester* society was solely entitled.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The testatrix, Miss *Kilvert*, died on the 26th of November, 1870, having, by will made in July, 1868, given a legacy of £10,000 "to the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity."

About 1777 a society had been founded at *Worcester* called *The Society for the Relief of the Widows and Orphans of Poor Clergymen, &c., &c., within the Diocese of Worcester.*

At that time the diocese of *Worcester* was co-extensive with the Archdeaconry of *Worcester*, and remained so till 1837, in which year the Archdeaconry of *Coventry* was added to the diocese. After this, in 1848, the rules of the society were altered, so as to keep its operations confined to the old diocese, and its title was altered to *The Society for the Relief of Clergymen's Widows and Orphans, and Necessitous Clergymen, in the Archdeaconry of Worcester.*

About 1777 a society had been founded called *The Charity for the Relief of Necessitous Clergymen, their Widows and Children, within the Archdeaconry of Coventry.* This society had remained unaltered up to the present time.

The testatrix was the daughter of a clergyman who was a yearly subscriber of £1 1s. to the *Worcester* society, and died in 1817. After his death his widow continued this subscription till her own death in 1860, and the testatrix, on her mother's death, increased this subscription to £5, which she continued during the remainder of her life. Neither the testatrix nor any of her family had subscribed to the *Coventry* society. There

was no other society besides these two which could claim to be the object of the gift.

The legacy having been paid into Court under the *Trustee Relief Act*, the *Worcester* society petitioned for payment of it to them.* The Vice-Chancellor *Malins* held that it must be [172 apportioned between the two societies (1). The *Worcester* society appealed.

Mr. *Cotton*, Q.C., and Mr. *C. Walker*, for the Appellants :—

There is no society to which the words of the gift accurately apply, but it is plain that the testatrix intended a gift only to one society. The words are *primâ facie* applicable to the *Worcester* society; and when we look at the fact of the testatrix having been a subscriber to this society, and not to the other, evidence of which is admissible as part of the surrounding circumstances (*Wigram's* Extrinsic Evidence (2),) there can be no doubt which society was intended. In *Bernasconi* v. *Atkinson* (3), part of the description applied to one person and part to another, and parol evidence was admitted according to the principle of *Doe* v. *Hiscocks* (4). The cases as to apportioning, *Simon* v. *Barber* (5), *Bennett* v. *Hayter* (6), do not apply; the gift is not a gift "for the relief of the widows and orphans of the clergy of the diocese of *Worcester*," but a gift to a particular society called *The Society for the Relief, &c.* It is a mere case of inaccurate description.

Mr. *Glasse*, Q.C., and Mr. *Vaughan Hawkins*, for the *Coventry* society :—

The Court will look to the object of the gift, which is plainly indicated to be the relief of the widows and orphans of clergy in the diocese; *In re Maguire* (7); *In re Clergy Society* (8). Parol evidence as to subscriptions is not admissible to show the intention : *Drake* v. *Drake* (9).

[The Lord Justice Mellish referred to *Grant* v. *Grant* (10).]

There is no case in which a charitable society has obtained a

(1) Law Rep., 12 Eq., 183.
(2) Page 160.
(3) 10 Hare, 345, 348.
(4) 5 M. & W., 363.
(5) 5 Russ., 112.
(6) 2 Beav., 81.
(7) Law Rep., 9 Eq., 632.
(8) 2 K. & J., 615.
(9) 8 H. L. C., 172.
(10) Law Rep., 5 C. P., 727.

bequest unless the description of the object has been correct. A purpose is pointed out which the Court can carry into effect by a scheme, as is indicated in *Mills* v. *Farmer* (1), and was done in **Loscombe* v. *Wintringham* (2) and *Reeve* v. *Attorney-* [173 *General* (3). In the case of *Clark* v. *Taylor* (4) the description of the objects was too vague to have effect given to it.

Sir W. M. James, L.J. :—

I cannot bring my mind to entertain any doubt as to what the meaning of the testatrix was. The sole question is, do her words amount to a gift for the relief of the widows and orphans of clergy throughout the whole diocese of *Worcester* ? Now, first, are the words "for the relief of the widows and orphans, &c.," used to indicate the objects of the bounty of the testatrix, or are they only used as part of the description of a society to which the testatrix intends to give a legacy ? I am clearly of opinion that they are only part of the description, and that what we have to find out is — who answers the description of the treasurer to whom the legacy is given ? The treasurer of the *Worcester* society gives parol evidence to show that he answers the description, just as if a legacy was given "to the son of A B.," a claimant would give parol evidence to show that he was the son of *A. B.* Had there been no other society with any such object, it would have been idle to suggest any doubt as to the treasurer of the *Worcester* society being the person intended ; as idle as to say that a bequest to "the Dean of *Westminster*" was not good, because he ought to have been described as the Dean of the Collegiate Church of St. *Peter*, at *Westminster*. Such a slight inaccuracy of description would have no effect. Here, however, we have a second society, which, if it had existed alone, might, I will assume, have answered the description with sufficient certainty. Parol evidence, then, is admissible to show which of the two was meant. Evidence has always been admitted to show which of two societies the testator knew, and to which of them he subscribed. Such evidence is admissible to remove an ambiguity, if there has been sufficient ground laid to raise an ambiguity, and I am assuming against the Appellants that the *Coventry* society has raised an ambiguity. The fund must, in my opinion, be paid to the treasurer of the *Worcester* society.

(1) 1 Mer., 55, 96. (2) 13 Beav., 87. (3) 3 Hare, 191. (4) 1 Drew., 642.

*Sir G. Mellish, L.J. :— [174

I am of the same opinion. The language of the bequest shows that the testatrix had some particular society in her mind, and the question is what society? There is no difference between the course to be adopted here and in any other case of finding who answers the description given in a will of a legatee. If there were no society answering the description sufficiently to enable it to claim the legacy, it may be that the Court would carry the gift into effect as a gift for the relief of the widows and orphans of the clergy of the diocese. Here, however, I think it clear that the Appellants come near enough to the description to be entitled to the legacy if there were no other society to compete with them. There is a description of the society by its old name; its name has been changed, but its object is precisely the same as at first, and the old name is not wholly inapplicable to it. Then, assuming another society to come near enough to the description to have ground for claim, parol evidence is admissible to remove the ambiguity, and the evidence adduced is decisive.

Solicitors: Messrs. *Merediths, Roberts, & Mills;* Messrs. *Duncan & Murton.*

L.JJ. Jan. 25, 27, 1872.

Ex parte Hawker. *In re* Keely. [214

[Law Reports, 7 Chancery Appeals, 214.]

Bankruptcy — Assignment of all Debtor's Property — Substantial Exception — Pension from the East India Company.

A debtor executed as security for an antecedent debt of £1500, an assignment which included all his property of any appreciable value, except a pension of 10*s.* 6*d.* a day to which he was entitled as a retired servant of the *East India Company* :—

Held (affirming the order of *Bacon*, C.J.), that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which, being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy.

THIS was an appeal by an execution creditor from an order of the Chief Judge refusing to discharge an injunction granted by the Registrar of the County Court of *Cornwall*.

On the 7th of July, 1871, *Hawker*, the Appellant, signed judgment in an action against *Keely* for £49 10*s*. 9*d*. debt and costs. The poundage made the total amount a little over £51. On the 11th of July he issued execution, and seized goods sufficient to satisfy the execution. On the 13th of July *Keely* filed a declaration of inability to pay his debts, and took proceedings for the liquidation of his affairs by composition or arrangement, and on the same day obtained an *interim* injunction restraining *Hawker* from further proceedings under the judgment, and appointing the 22d of July for him to show cause why he should not be absolutely restrained. On the 22d the Registrar granted an absolute injunction to restrain the bailiff of the County Court from selling the goods under the execution. On the 9th of August the first meeting of creditors was held, and refused to accede to liquidation by arrangement. The result of a second meeting was the same, and ultimately, on the 13th of September, *Keely* was adjudicated bankrupt; the adjudication being founded on the declaration of the 13th of July.

Hawker appealed to the Chief Judge, and when the appeal came on the Chief Judge was of opinion that the injunction could
215] not, *on the above materials, be sustained; but by arrangement the case was adjourned to allow the trustee to bring forward circumstances which made a new case, viz., that *Keely* had committed an act of bankruptcy on the 8th of July, by giving a bill of sale comprising the whole of his property to secure an antecedent debt.

It appeared that *Keely* was indebted to the *Liskeard Bank* in £1500 on three bills of exchange which had been dishonored, and he accordingly executed the bill of sale in question to *N. Male*, the manager of the *Camelford* branch of the bank. This bill of sale was an absolute assignment, as upon a sale to *Male* for £500, of all *Keely's* household furniture, goods, chattels, and effects then being in, or upon, or belonging to the messuage, garden, and premises then in *Keely's* occupation, and the horses, cattle, sheep, pigs, crops, corn, hay, straw, consumable stores, agricultural implements, carts, carriages, and farming utensils, live and dead stock, goods, chattels, and effects then being in

or upon the several lands and premises in the occupation of *Keely* in the three parishes therein mentioned, the particulars of which were set forth in a schedule, and all other the goods, chattels, and effects of *Keely* in those three parishes.

Keety had retired from the service of the *East India Company*, and had a retiring pension of 10*s.* 6*d.* a day. Evidence was given that he had some landed property at *Rangoon*, but nothing was shown as to its value. It was also deposed that he was lessee of a house on which he had covenanted to expend, and had expended, £200, of which lease, commencing in 1869, there were about twelve years to run; but the solicitor of the trustee deposed that these premises had been made over by *Keely*, with the privity of the landlord, to *Caroline Keely*, and would only revert to *Keely* in the event of his surviving her. *Keely* was also tenant, at a rack rent, of some lands, which he farmed, but his interest in them was rejected by the trustee as valueless. *Keely* had, to a small extent, sold manure at a commission, and his dealings in manure were relied on as trading. The above particulars, and the chattels mentioned in the bill of sale, were the whole of his property.

In this state of circumstances the Chief Judge held the assignment to be an act of bankruptcy, and refused to dissolve the injunction.

*Mr. *Kay*, Q.C., and Mr. *Bagley*, for the execution cre- [216
ditor, in support of the appeal, referred to *Lomax* v. *Buxton* (1); *Hopkinson* v. *Lusk* (2); *Woodhouse* v. *Murray* (3).

[*Gibson* v. *East India Company* (4) and *Innes* v. *East India Company* (5) were referred to during the argument as showing that a pension of this kind was not available for creditors.]

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the Respondent, were not called upon.

Sir G. Mellish, L.J. :—

The question we have to decide is, whether this bill of sale was within the rule that an assignment of substantially the

(1) Law Rep., 6 C. P., 107.
(2) 34 Beav., 215.
(3) Law Rep., 2 Q. B., 634; 4 Q. B., 27.
(4) 5 Bing. (N.S.), 262.
(5) 17 C. B., 351.

whole of a debtor's property, to secure an antecedent debt, is an act of bankruptcy. The Chief Judge has decided that it was an assignment of substantially the whole of the debtor's property—a conclusion to which he came, as a matter of fact, after hearing the principal witness examined and cross-examined. It is now contended that there was a substantial amount of property not included. First, a lease, which is said to have been worth £150; but it is probable that when all the effects had been sold off, the lease would not sell for anything. Secondly, there is a property in *India*, but the debtor himself speaks with uncertainty as to whether he has it or not, and there is no evidence as to its value. Thirdly, there is the pension of 10*s.* 6*d.* a day; but this is a property which does not pass to the trustee in bankruptcy, and could not be taken in execution by a creditor. We think, therefore, that this cannot constitute a substantial exception. The result is that our opinion agrees with that of the Chief Judge, and that the appeal must be dismissed with costs.

Solicitors: Messrs. *Clark, Woodcock, & Ryland*; Mr. *J. Elliott Fox.*

L.JJ. Feb. 12, 1872.

223] **In re* BIGNOLD'S SETTLEMENT TRUSTS.

[Law Reports, 7 Chancery Appeals, 223.]

Appointment of New Trustees—"Incapable to act"—Residence Abroad—Trustee Act, 1850, *s.* 32.

The Court has power, under the 32d section of the *Trustee Act*, 1850, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent.

Semble, a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad.

Re Blanchard (1) explained.

THIS was a Petition brought before the Lords Justices in the first instance at the request of Vice-Chancellor *Wickens*, in whose Court the Petition had been set down.

(1) 3 D. F. & J., 131.

The Petition was entituled in the above-mentioned matter, and also in the matter of the will of *H. D. Hemsworth*, and of the *Trustee Acts*, 1850 and 1852. It stated that, under the marriage settlement of Mr. and Mrs. *Bignold*, and the will and codicil of the lady's father, certain trust funds had become vested in, and blended in the hands of, certain trustees, one of whom, on the 2d of July, 1868, left *England* for *Tahiti*, with the intention, which he had ever since adhered to, of residing there permanently as a merchant. Under these circumstances the donees of the power of appointing new trustees under the settlement and will respectively had executed deeds appointing a new trustee of them respectively, in place of the trustee out of the jurisdiction. And the object of the Petition was to obtain vesting orders of the property, dispensing with service on the trustee out of the jurisdiction.

The Petition was presented by all the parties interested under the settlement and will, by the two trustees within the jurisdiction, and the new trustee, and there were no Respondents.

No difficulty arose with reference to the exercise of the power contained in the settlement; but the power contained in the will only extended to the cases of trustees "dying, disclaiming, or desiring to be discharged, or refusing, declining, or becoming incapable *to act." The question therefore was, [224 whether the fact of the trustee's permanent residence out of the jurisdiction in the present case rendered him "incapable to act" within the meaning of the power.

Mr. *Horton Smith*, for the Petitioners, submitted that the appointment was valid, and that *Mennard* v. *Welford* (1) and *Sugden* on Powers (2) should be followed, rather than *Withington* v. *Withington* (3) and *Re Watts's Settlement* (4).

THE LORDS JUSTICES inclined to the opinion that the incapacity to act meant a personal incapacity, and that each case must depend on its own circumstances; but, without expressly deciding the point, suggested that the difficulty might be met by the Court appointing a trustee under the 32d section of the *Trustee Act*, 1850.

(1) 1 Sm. & Giff., 426.
(2) Page 888, note (a), 8th Ed.
(3) 16 Sim., 104.
(4) 9 Hare, 106.

Mr. *Horton Smith* said that a new trustee had been appointed in place of a person out of the jurisdiction in *Re Stewart* (1), and *Re Harrison's Trusts* (2). But a doubt had arisen from the decision in *Re Blanchard* (3), where it was held that the Court had no power to remove a trustee against his wish. In the present case the trustee had not consented to be removed, nor had he been served.

THE LORDS JUSTICES were of opinion that *Re Blanchard* did not militate against the previous authorities; and that the Court had authority to make the appointment. They therefore ordered the Petition to stand over with liberty to amend, so as to ask for the appointment of the new trustee, and the consequential vesting order. The Petition was to be then mentioned again, and the usual affidavit of fitness of the new trustee to be produced.

Solicitor: Mr. *D. Keane.*

L.JJ. Feb. 17, 1872.

229] **In re* WYNNE.

[Law Reports, 7 Chancery Appeals, 229.]

Lunacy—Practice—Jurisdiction—Agreement by Committee to grant a Lease.

A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the Master in Lunacy applied for, but the tenant was let into possession, and expended a considerable sum in repairs and improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by Petition to have the terms of his arrangement with the agent carried into effect:—

Held, that the Court had jurisdiction to make an order giving effect to that arrangement; and order accordingly.

JOHN WYNNE having been found to be a person of unsound mind, his wife, *Virginia Wynne*, was, in July, 1858, appointed committee of his person and estate.

(1) 8 W. R., 297. (2) 22 L. J. (Ch.), 69. (3) 3 D. F. & J., 131.

*Part of the lunatic's property consisted of an estate com- [230
prising a mansion-house and farm, which, in the beginning of 1870, were occupied by Mr. *Blezard*. *William Jones* acted as agent for the committee, and all communications relating to the property were made to him. In 1870 Mr. *Blezard*, being desirous of leaving the place, arranged to hand it over to the Petitioner, Mr. *Cope*, if Mr. *Cope* would buy his furniture and could get himself accepted as tenant. Mr. *Cope*, who required the property as a summer residence and for sporting, had an interview in March, 1870, with Mr. *Jones*, who, as Mr. *Cope* deposed, represented himself as an agent entitled to let the property, and in the same month letters passed between him and Mr. *Cope*, which, assuming Mr. *Jones'* capacity to contract, constituted an agreement for a lease for three years from the 25th of March, 1870. No further agreement was signed, nor was the sanction of the Master in Lunacy applied for; but on the last-named day Mr. *Cope* entered into possession with the knowledge of the committee. Mr. *Cope* paid for the furniture and tenant's fixtures, and expended upwards of £400 in repairs and permanent improvements.

On the 14th of September, 1871, the committee served Mr. *Cope* with notice to quit on Lady Day, 1872. The rent was not in arrear, nor was it alleged to be too low, nor was any ground suggested for objecting to Mr. *Cope* as a tenant.

Mr. *Cope* thereupon presented his Petition in Lunacy, and in the matter of the *Lunacy Regulation Act*, 1853, praying that *Virginia Wynne*, as the committee of the estate, might be directed to grant the Petitioner a lease in conformity with the terms agreed upon between him and Mr. *Jones*, as mentioned above, and might be restrained from ejecting the Petitioner.

Mr. *Little*, Q.C., and Mr. *Jackson*, for the Petitioner.

Mr. *Southgate*, Q.C., and Mr. *Jones-Bateman*, for the committee, raised the question of jurisdiction, the Petitioner being a person not interested in the lunatic's estate, but did not very strongly press the objection.

THEIR LORDSHIPS thought that they had jurisdiction to make the order, and that it would be right to make it in the cir-

231] cumstances *of the present case, for that the Court would do on behalf of a lunatic what a just and reasonable owner would do. They accordingly directed the committee to allow the Petitioner to remain in possession on the present terms till Lady Day, 1873.

Solicitors: Mr. *J. H. Lydall;* Messrs. *Merediths, Roberts, & Mills.*

(*Including Bankruptcy Cases*)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS

AND THE

CHIEF JUDGE IN BANKRUPTCY.

M.R. June 8, 9, 12; Nov. 3, 1871.

KIMBERLEY v. DICK.

[Law Reports, 13 Equity Cases, 1.]

[1869 K. 20.]

Builder's Contract — Arbitration Clause — Agreement as to price between Architect and Employer — Extra Works — Complicated Account — Jurisdiction.

An architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect's commission and all expenses, and engaged the services of a builder who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, and entered into a contract with the employer for the completion of the work from the architect's plans, and under his superintendence, for £13,690, with power for the architect to order extra works, and with a clause providing that all questions between the parties under the contract should be settled by the award of the architect — on a suit by the builder claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, and for extra works:—

Held, that the account was too complicated to be taken at law, and ought to be taken in this Court:—

Held, also, that on the evidence the architect was the agent of the employer; that his undertaking having been concealed from the builder, the arbitration clause in the contract could not be enforced; and that the Plaintiff was *en- [2

titled to an account for what was due to him for any works executed by him under the architect's direction not included in the contract, and, for any works so executed under the contract the price for which was not therein included, and for any variations made under the architect's direction of works included in the contract.

THE Plaintiff in this case was *Alfred Kimberley*, a builder and contractor at *Banbury*. The Defendant, *William Wentworth Fitzwilliam Dick*, the member for *Wicklow*, was the owner of property at *Humewood*, in the county of *Wicklow*, on which the Plaintiff erected the mansion-house, the contract for which was the subject matter of the suit. The defendant *William White* was an architect in *London*, employed by the first-named Defendant to design and superintend the erection of the house in question.

In 1866, the Defendant *Dick* being desirous of erecting a mansion-house on his property, and having heard of the Defendant *White* as an architect, requested his agent, Mr. *Fenton*, to write and ascertain the terms on which he would undertake the preparation of the plans and the superintendence of the work. Accordingly, in August, 1866, *Fenton* wrote to the Defendant *White* the following letter:—

"As Mr. *Dick* has never been engaged in any building operations, and is in some measure ignorant of the conditions on which architects usually enter upon an undertaking such as he contemplates, he is desirous to know the terms, to prevent any misunderstanding hereafter. It would be well if you named the conditions both for completing the entire building, or for merely coming to *Humewood*, and nothing more to be done, which is very unlikely."

The defendant *White* sent an answer stating his terms, to which *Dick* assented, and at a subsequent interview informed him that he did not wish to expend more than £15,000, including architect's commission and other incidental charges. It was then arranged that *White* should prepare plans and elevations of buildings, of which the entire expense should not exceed £15,000. On the 27th of February, 1867, Mr. *White* sent, in pursuance of these instructions, plans and elevations, and a letter to the following effect:—

"February 27th, 1867.

"Dear Mr. *Dick*,—I am sending you the plans with the eleva-

tion *of the front. On the other side I give a summary of [3 totals which I feel sure may be relied upon as a guide to the cost.

"Upon hearing from you I shall be prepared at once to go on with the plans and specification, and to produce a builder who would, I have no doubt, enter into a contract for the amount named. Yours, very faithfully,

William White.

"Shell of house		£10,000
Fireplaces, bells, and other finishings		1,800
Contractor's estimate	£120	
Clerk of works	360	
	—	480
		£12,280
Architect		620
Travelling expenses		60
House		£12,960
Total, say		13,000
Stables —		
Shell	£2,000	
Fittings	250	
Other expenses	250	
Stables		£2,500."

On the 28th of the same month *White* applied to the Plaintiff, who had before executed works under his superintendence, to ascertain if he would undertake such a contract; and after some correspondence, the Plaintiff attended at *White's* office for three days, on the 26th, 27th, and 28th of March, 1867, when he was informed generally of what the projected works would consist. The Plaintiff alleged that no specifications or working drawings were at that time prepared, and there were no materials in existence from which a contractor could take out the quantities; that the Defendant *White* showed him the sketch drawings of the house and offices, and called out the quantities of the work to which such drawings related, and the Plaintiff thereupon stated the prices for such quantities, but that as to the laundry, stabling, and fittings there were no drawings; that the aggregate price of the house *thus arrived at amounted, without fit- [4

tings, to £9500, and that the following gross sums were set down by *White*, namely, £640 for the laundry and courtyard; £1620 for the furnishing and fittings; and £1800 for the stables — making a total of £13,500.

The Defendant *White* stated that on the occasion referred to he produced plans and paper sufficient to enable the Plaintiff to take out the quantities of work with sufficient accuracy, with the assistance and explanations which the said Defendant offered to give him.

On the 28th of March *Dick* received the following letter from *White*:—

"March 27th, 1867.

"Dear Mr. *Dick*,— You will be glad to hear that I have gone satisfactorily over the work with Mr. *Kimberley*, and he is ready to sign a short preliminary contract to-morrow if you approve —

"Shell of house, including laundry, &c. .	£10,140
Finishings and fittings	1,620
Stables	1,800
Then there will be clerk of works and expenses	380
Contractor's estimate	140
Architect and expenses	780
	£14,860

"So that you may safely rely upon the £15,000 covering everything, unless you want more done than I have proposed. Indeed, I can now promise it shall not exceed that sum.

"Yours faithfully,

"*Wm. White.*"

The following tender was prepared by the Defendant *White*, and signed by the Plaintiff, relying, as he alleged, on the representations made to him:—

"To *W. W. F. Dick*, Esq., M.P. "March 29, 1867.

"I hereby undertake to erect and complete the proposed house and offices, furnished and fitted complete with stabling and fittings, at *Humewood*, in the county of *Wicklow*, *Ireland*, in accordance with the plans and particulars prepared for the same, and fully explained to me verbally by *William White*, F. S. A.,

architect, for *the sum of £13,690, as enumerated below. [5 And I hereby agree and undertake to enter into a proper contract for the same, in accordance with the general form submitted to me which accompanies this tender, so soon as the working plans and specifications shall be ready for the same. And I will engage to submit to the sole adjudication of the said architect all questions relating to the same, completing the whole of the works to his entire satisfaction by the end of June, 1869, but having the back wings and offices ready for your occupation by the end of June in the year 1868, and the remainder of the house by the end of September in the same year, with the exception of decorative finishings: —

House and offices without fittings, but including laundry and courtyard	£10,200
Finishings and fittings	1,690
	11,890
Stables and fittings complete . . .	1,800
Total	£13,690

"All the materials to be the best of their respective kind; the woodwork to be well-seasoned; the joinery to be cut out; and the whole of the timbers delivered on the spot immediately on the signing of the contract. (Signed) "*A. Kimberley.*"

This tender was sent to *Dick*.

With regard to this tender the Plaintiff stated that the plans and particulars therein referred to were pencil sketch drawings of the house and offices only, and the quantities and gross sums noted down by *White* at their meeting at *White's* office, and that the Plaintiff signed the tender on the express understanding and condition that such quantities and gross sums respectively should not be exceeded in the detailed working plans and specifications.

The defendant *White* made the following statement respecting this part of the case:—

"On the morning of the 28th or 29th the further question arose in conversation as to what must be done in case the

working plans and specification, which I expressly stated should form the sole basis of the contract, should be found so far unduly to exceed the original quantities as to create difficulties 6] in the Plaintiff's signing *the formal contract. This was agreed by us to be very unlikely, and the Plaintiff expressed himself satisfied that liberal spirit had been shown in the estimate and that he should not be over-nice about small matters. The Plaintiff well knew that I never had been, and never would be, responsible either on my own behalf or on behalf of my clients for the correctness of the quantities; and that I never had received, and never would receive, any consideration for assisting a builder in taking out quantities; but I gave him to understand that, if he should not see his way in accepting the contract finally at the moment agreed upon, I should be willing to revise the said plans and specification in detail; or that I would endeavor to get Mr. *Dick's* consent to increase the amount, and at the worst (which was most unlikely), that I must procure that payment should be made to him by Mr. *Dick* for such work as he might have already executed prior to the refusal to sign the contract, with liberty to myself, on Mr. *Dick's* behalf, to enter upon negotiations with other builders."

It was then agreed that the works should be proceeded with. They were commenced at the beginning of April, and in the meantime *White* submitted to *Dick* his plans and specifications.

On the 3d of June, 1867, the Plaintiff was requested to come up to town to sign the contract in the course of a few days. He was ill, and unable to come up by the time specified; and *White's* principal clerk was accordingly sent down to him with the contract and the plans, which, after a short interview, the Plaintiff signed; but he alleged that he had not sufficient time or opportunity, owing to the state of his health, properly to examine them. There was much conflicting evidence on this subject.

The contract was dated the 12th of June, 1867, and was made between the Plaintiff as contractor, on the one part, and the Defendant *Dick*, on the other part; and thereby, after reciting that the Plaintiff had, on the 29th of March, 1867, signed the undertaking to enter into a contract, and that the present contract was the general form in the undertaking referred to as accompanying the tender, and that the specification thereto

annexed and the working plans had been since submitted to, and approved by, him, and were to form part of the contract, the Plaintiff thereby agreed to complete the works to the satisfaction of the architect for the *sum of £13,690; and it was [7 thereby provided as follows: "The said architect is held and considered to have the power of ordering any alterations or omissions during the progress of the works, without in any way vitiating this contract, and such alterations shall be thereupon carried out by the said contractor; and further, that in case any difference of cost be caused by such alterations, a formal order for the same, signed by the architect, shall be sent to the contractor, whose proceedings to carry out such works shall be considered as a due acceptance of the same," and further: "The contractor agrees that no actual or pretended excess, whether in construction, materials, or matter of detail shown by the subsequent working drawings, shall in anywise be considered as a claim for extra charges except as herein provided; and further, that he will do no extra work, nor in anywise claim or demand payment for the same, if done, but on these conditions."

The contract also contained the following proviso:

"And it is hereby further agreed that all questions between the said parties touching the matters relating to this contract, shall be left to the sole determination or award of the said architect; and the said parties hereto respectively shall and will abide by, and perform and keep, the said determination or award made in writing under his hand and seal delivered to the said parties respectively, direct. And it is hereby further agreed by and between the said parties that the submission hereby made shall, at the option and at the expense of either of the parties requiring the same, be made a rule of Her Majesty's Court of Queen's Bench at *Westminster*."

The working plans referred to in the contract were thirteen in number, and there were seventy-seven pages of specifications, all of which the plaintiff marked with his initials, but he stated that it would have taken at least a month's diligent labor of a skilled contractor to take out the quantities from them. The Plaintiff had no copy of the contract left with him.

The Plaintiff proceeded with the building and with various

extra works under the direction of the architect, believing, as he alleged, that for all such extra works, he would be paid. The cost of the works, including such extra works considerably ex-
8] ceeded the *amount mentioned in the estimate and contract; and this, according to the Plaintiff, was partly owing to the fact that the quantities in the detailed working drawings prepared by *White*, and appended to the contract, considerably exceeded those given to the Plaintiff as the basis of his estimate. The Defendant *White* refused to certify for the payment of such extra works.

At the beginning of the year 1869, the Plaintiff for the first time discovered that the Defendant *White* had given a promise or guarantee to the Defendant *Dick* that the whole cost of the works comprised in the contract should not exceed £15,000, including the architect's remuneration and the salary of the clerk of the works. The Plaintiff alleged that *White* had thereby a personal interest in keeping down and reducing the amount justly payable to the Plaintiff, and that it was inequitable that any of the matters in question should be left to his adjudication.

The Defendant *Dick* refused to pay the amount claimed by the Plaintiff for extra works, and the Plaintiff accordingly filed his bill against the two defendants, praying that it might be declared that, in addition to the said contract price of £13,690, he was entitled to be paid by measure and value for all quantities of work executed by him beyond the quantities included in the Plaintiff's estimate of the 29th of March, 1867; that an account might be taken of what, on the footing of such declaration, was due to the Plaintiff from the Defendant *Dick* in respect of the works included in the estimate, and the extra works executed by the Plaintiff; and that the Defendant *Dick* might be ordered to pay what should be found due.

The Defendant *Dick* declined to enter into the question between the Plaintiff and *White*, and relied entirely on the Plaintiff's tender and contract; and stated that he was ready and willing to pay whatever might be due to him under the contract as soon as he obtained the requisite certificates of the amount. He denied that *White*, while acting as his architect, was his agent. He admitted that the basis of his employment of *White* was, that the sum of £15 000 was to cover every ex-

penditure, as stated in the letter of the 27th of March, 1867, and submitted that the bill ought to be dismissed with costs.

The Defendant *White's* grounds of defence have already been *partly stated. He, by his answer, went fully into all the [9 transactions, for the purpose of showing that he had treated the Plaintiff with good faith; that the Plaintiff had full opportunity of preparing his estimate; that the price mentioned in the contract ought not to stand for the quantities and works stated as the basis for the Plaintiff's estimate; and that the Plaintiff ought not to paid by measure and value for the excess in the quantities and works executed by him; but that the contract was binding on the Plaintiff, and ought to be strictly adhered to, and that it was not now open to the Plaintiff to raise any question as to alleged discrepancies between the quantities in his estimate and those in the contract plans and specifications. He further stated that he had not given any personal guarantee to *Dick* that the total cost should not exceed £15,000, and that he had not thereby any personal interest in keeping down that cost.

Mr. *Southgate*, Q.C. and Mr. *Begg* for the Plaintiff:—

The Plaintiff in this case is entitled to an account of all extra works done and executed by him in pursuance of the tender. The tender and the contract must be taken together, and as the contract was executed by the Plaintiff without sufficient materials being furnished to him by the Defendant *White*, and when he could not give the time which was necessary to enable him sufficiently to consider it, he cannot be strictly bound by it wherein it differs from the tender. Besides, the evidence shows that the real contract between the parties differed materially from the written contract; and parol evidence may be adduced to show what the actual contract is. The defendant *White* must throughout these transactions be regarded as the agent of *Dick*, and *Dick* must be held responsible for his acts.

It appears that *Dick* had been assured by *White* that the whole expense should not exceed the sum of £15,000. This promise or undertaking was never disclosed to the Plaintiff; and on this ground we contend that the arbitration clause in the contract providing that "all questions between the parties touching the matters relating to the contract shall be left to the sole determi-

nation or award of the architect," cannot be enforced; for it has been held that where there is any circumstance calculated 10] to bias *the mind of an arbitrator unknown to either of the parties who have submitted to his decision, that is a sufficient ground for the interference of the Court.

Thus, in *Kemp* v. *Rose* (1), where a builder, by his contract, bound himself to abide by the decision and certificates of an architect as to the amounts to be paid for the work, not knowing that the architect had given an assurance to the employer that the cost of the building should not exceed a certain sum, although he refused to guarantee that amount, the Court did not consider the decision of the architect made under such a bias as binding, but gave directions so as to ascertain, under the authority of the Court, how much remained justly due to the Plaintiff. That case is a direct authority in the Plaintiff's favor.

The same principle was recognized in *Scott* v. *Corporation of Liverpool* (2), where, however, as the builder was aware of the agreement between the architect and his employer, and of the fact of the architect's interest in consequence, the builder's case failed. In *Pawley* v. *Turnbull* (3), the Court, on being satisfied that there had been unfair conduct towards a builder, on the part of an architect whose decision was by the terms of the contract to be final, decided that the builder must be relieved from all penalties by reason of the non-completion of the contract, and declared the architect's decision not binding.

On these authorities we contend that the arbitration clause in the contract here must be set aside. That being so, the question arises whether the Plaintiff is to be left to his remedy at law. We submit that this Court has full jurisdiction to deal with it. Where, as here, the account is a very complicated one, and can be more conveniently taken, in a Court of Equity, then such an account will be ordered to be taken, as in *McIntosh* v. *Great Western Railway Company* (4) and *Taff Vale Railway Company* v. *Nixon* (5).

Mr. *Jessel*, Q.C., for the Defendant *Dick*:—

Where fraud is charged by a bill which the Plaintiff fails to establish, then he cannot succeed unless he has some other equity

(1) 1 Giff., 258.
(2) 1 De G. & J., 369.
(3) 3 Giff., 70.
(4) 3 Sm. & Giff., 146.
(5) 1 H. L. C., 111.

*distinct from that based on the allegations in the bill. [11 The case of *Kemp* v. *Rose* (1), relied on by the other side, is not law. It is inconsistent with the decision of the House of Lords in *Ranger* v. *Great Western Railway Company* (2), where a contract was entered into between a railway company and a contractor, and in case of dispute between the contractor and the chief engineer before the completion of the works it was agreed that the decision of the engineer should be final, and the contractor subsequently discovered that the engineer was a large shareholder in the company. Disputes having arisen he filed his bill to have the accounts taken, but the House of Lords held that the ground above stated formed no ground of relief. So in *Hill* v. *South Staffordshire Railway Company* (3), where payments to a contractor were to be certified by the engineer of the railway company, he was held not to be disqualified from so doing, on the ground of his having become lessee of the company at a rent depending on the amount so certified for.

In *Bliss* v. *Smith* (4) *Kemp* v. *Rose* was cited but disregarded by the Court.

In *Scrivener* v. *Pask* (5), where an owner employed an architect to prepare plans and a specification for a house, and to procure a builder to erect it for him, the architect took out the quantities, and represented to the builder that they were correct, and the builder thereupon made a tender which was accepted. The quantities proved to be incorrect, and the Plaintiff expended upon the building a much larger amount of materials than he contemplated. It was there held that there was no evidence that the architect acted as the agent of the owner in taking out the quantities, or that the owner guaranteed their accuracy; and that therefore the builder could not recover more than his contract price.

The same principle is applicable here, and *Dick* cannot be held to have guaranteed the correctness of *White's* quantities.

Mr. *W. Pearson*, on the same side :—

By the terms of the contract the Plaintiff could not be allowed

(1) 1 Giff., 258.
(2) 5 H. L. C., 72.
(3) 11 Jur. (N.S.), 192.
(4) 34 Beav., 508.
(5) 18 C. B. (N.S.), 785; Law Rep. 1 C. P., 715.

12] *for extra works, except where authorized by the architect. By the case of *Scott* v. *Corporation of Liverpool* (1), it appears that such a contract is as much binding in equity as at law. The Plaintiff claims under the contract, by which he virtually adopts it, and he also claims to set aside the contract. He contends that the quantities were not fairly represented to him by *White*, and that he signed the contract on the footing of such representations, which were, he says, adopted by *Dick*. But, even if he was so misled, that would not affect *White*, unless he were *Dick's* agent, which cannot be established.

As regards an architect's authority to bind his employer, he cannot bind him for extra works, except under the contract, and then only by orders in writing: *Rex* v. *Peto* (2); *Cooper* v. *Langdon* (3). It is settled law that an architect is only the agent of an owner for the purpose of seeing that the plans are adhered to, and that if a builder, on the authority of an architect, makes alterations, his only remedy is against the architect. He cannot recover for anything beyond the contract, except by special authority from the owner.

In *Coker* v. *Young* (4), which was a case on a building contract, providing that extra works were to be allowed for at amounts to be named by the surveyor, it was held that the contractor could not claim for work as in excess of the quantities on which it was based, nor for any additions beyond the amount allowed by the company.

The Plaintiff's remedy, if any, is at law; and there is no equitable construction of such a contract distinct from that which is legal. This appears from the case of *Scott* v. *Corporation of Liverpool.*

The bill is framed on the ground of equitable fraud; but even if that were established, the contract would not be void, but voidable where redress could be obtained at law.

Lastly, if the Plaintiff seeks to set aside the contract he cannot do so in the present suit without filing a bill to have the contract rectified.

[13 *Sir *R. Baggalley*, Q.C., and Mr. *Cozens-Hardy*, for the Defendant *White*:—

(1) 1 DeG. & J., 369.
(2) 1 Y. & J., 37.
(3) 9 M. & W., 60.
(4) 2 F. & F., 98.

The Defendant *White* is not a necessary party to this suit, and, as against him, the bill should be dismissed with costs. It is true that there are allegations in the bill impeaching the propriety of *White's* conduct, but no relief is prayed against him. There is no case of collusion between *Dick* and *White*, and no allegation against him subsequent to the execution of the contract. If there has been a mistake common to both parties to a contract, then the Court will rectify a contract; but if the mistake is only on one side, then the plaintiff must show not only that he was misinformed, but that the mistake was known to *White*, and that he was acting as agent for *Dick*.

Mr. *Southgate*, in reply :—

The case of *Kemp* v. *Rose* (1) has not been overruled. In *Ranger* v. *Great Western Railway Company* (2) the contractor might have known that the engineer was a shareholder. In *Hill* v. *South Staffordshire Railway Company* (3) the suit was not decided.

In this case the architect gave the Plaintiff the quantities, not the drawings from which the quantities were to be taken out, and he was led to believe that the plans would not exceed them. This has proved not to be the case, and hence a case of equitable fraud arises on the part of the agent for which the principal is liable : *Barwick* v. *English Joint Stock Bank* (4).

It is said that we ought to have filed a bill for the rectification of the contract, but that is only necessary where no occasion has arisen for acting under the contract, not where the whole question as to the rights of the parties is in dispute.

There are numerous cases where the Court has admitted evidence to show what was the real contract between the parties. Thus, in *Harris* v. *Rickett* (5), in the case of a bill of sale, evidence of an original verbal agreement was admitted where a subsequent written agreement did not contain the whole of the agreement between *the parties. So, in *Rogers* v. *Hadley* (6), [14 parol evidence was held to be admissible as to certain bought and sold notes, to show that there was no real contract between

(1) 1 Giff., 258.
(2) 5 H. L. C., 72.
(3) 11 Jur. (N.S.), 192.
(4) Law Rep. 2 Ex., 259.
(5) 4 H. & N., 1.
(6) 2 H. & C., 227.

the parties. In *Lindley* v. *Lacey* (1) evidence of a prior oral agreement was held to be admissible, notwithstanding a subsequent agreement in writing.

In *Malpas* v. *London and South Western Railway Company* (2) parol evidence was admitted to show that a railway company had verbally agreed to carry cattle to a particular station, when a subsequent consignment note only specified an intermediate station on the line.

In *Morgan* v. *Griffith* (3) evidence was admitted of a parol agreement collateral to a written lease; and in *Bold* v. *Hutchinson* (4) a settlement was rectified and made comformable to marriage articles on evidence of representations made at the time by the lady's father.

Nov. 3. Lord Romilly, M.R.:—

This suit is instituted by a builder residing at *Banbury*, in *Oxfordshire*, against Mr. *Dick*, the Member of Parliament for the county of *Wicklow*, in *Ireland*, and Mr. *White*, an architect residing in *London*.

In the beginning of 1867 Mr. *Dick* employed Mr. *White* as his architect to build a mansion for him at *Humewood*, in the county of *Wicklow*, and Mr. *White* employed the Plaintiff to execute the necessary works.

The Plaintiff insists that, besides the contract price, he is entitled to be paid for extra works which are not included in the contract. In terms this would not be contested, but the parties differ as to what works are or are not so included. The Plaintiff disputes the meaning and effect of the contract which, as he contends, entitles him to be paid by measure and value for all quantities of work executed by him in excess of the quantities included in his estimate, upon which, and having exclusive relation to which, he maintains the contract was founded and ought to be construed.

15] *Mr. *White* takes issue on these facts; he denies any liability except under the contract, and asserts that all is provided for by the contract, which is to be construed strictly:

(1) 17 C. B., (N.S.), 578.
(2) Law Rep., 1 C. P., 336.
(3) Ibid., 6 Ex., 70.
(4) 5 D. M. & G., 558.

Mr. *Dick* says that this is a matter in which he has no concern, and that the Plaintiff and Mr. *White* must fight it out between them; for that he entered into a contract with Mr. *White* to build, or cause to be built, the house in question for £15,000, including everything, and that he has paid, or has always been and is now ready and willing to pay, every part of such £15,000 on receiving the certificates of Mr. *White* stating the propriety of paying them, and certifying that the work has been done.

It is necessary for the purpose of disposing of this case, to ascertain, in the first instance, how far Mr. *White* was the agent of Mr. *Dick*, and also how far Mr. *White* acted, and how far he assumed to act, as such agent; and in order to enable the Court to do so, it is necessary carefully to examine the facts which are established in this case.

[His Lordship then stated the facts of the case previous to the signing of the tender, and with reference to the interview between the Plaintiff and the Defendant *White* on the 26th, 27th, and 28th of March, 1867, observed: —]

The accounts given by the Plaintiff and the Defendant of what then occurred are very different. It is, however, admitted that no working drawings were produced, nor was any full specification of the works intended to be made; but the Defendant insists that what was produced was quite sufficient to enable the Plaintiff to come to a just estimate, and one sufficient to enable him to make a proper tender. The drawings and other documents are themselves given in evidence, and are produced to me, and I have carefully examined them. To me they appear to be extremely rough and undefined, so much so as, without much concomitant explanation, to convey no accurate idea of what was required or intended to be done — certainly not to an unprofessional mind; and, judging from the evidence, I should conclude that nearly the same result would occur to a professional mind. It must, however, always be remembered that in technical and professional matters of this description with which the Court is not familiar, and where it is only assisted by such explanations as counsel can afford — such *assistance being [16 for the most part received from their clients as the occasion arises — much that seems obscure to the Court might be clear and distinct to a professional eye.

[His Lordship, after reading the tender of the 29th of March, continued :—]

It is, having regard to what subsequently occurred, proper to observe that this document states that the explanations of Mr. *White*, on which the estimate was founded, and which were most essential for enabling any one to form a just estimate, were given verbally; but at the same time Mr. *White* informed the Plaintiff that he would not be responsible, either on his own behalf or on behalf of his client, for the correctness of the quantities; but at the same time gave him to understand that if the Plaintiff should not see his way to accepting the contract finally at the amount agreed upon, he, Mr. *White*, would be willing to revise the plans and specification, or that he would endeavor to get Mr. *Dick* to increase the amount, or that he would procure payment to be made to him for such work as he might have executed prior to his refusal to sign the contract.

And in the estimate on which the tender is founded it is proper also to notice that the only subject-matter of which the quantities were taken out on those three days was the house, and that without any fittings. The laundry and courtyard were lumped in at £640, the finishings and fittings were in like manner set down in a lump sum at £1640, and the stables and fittings complete were similarly estimated without any details at £1800.

In respect, therefore, of any part of the works, with the exception of the bare house itself, the Plaintiff, in making the tender, relied on the estimate Mr. *White* thought proper to suggest.

The matter was so far considered as settled that though no formal contract was then executed it was mutually understood between them that the Plaintiff was to begin the works at once, subject to Mr. *White* and himself being able afterwards to come to a binding and definite arrangement.

Accordingly, within a week from this time, the Plaintiff commenced the works, which were continued, though without any proper working drawings, till June following, when the contract 17] in *question was signed. The circumstances connected with this signature of the contract are as follows:

[His Lordship then shortly stated the circumstances under which the contract was signed.]

There is much discussion and conflicting evidence given respecting the signature of the contract, and what then occurred, and which, though I think it necessary to refer to it, does not, in my opinion, very materially affect the principal question which arises in this suit.

The Plaintiff had unquestionably not time, according to any statement of the time which elapsed, to go through the contract and specifications with any pretence to accuracy; but on the other hand, this is certain, that no false representations were made to him at the time, and if he did the whole thing in a hurry he must take the consequences of his haste, however much that haste might have been occasioned by a desire on his part to promote the convenience of Mr. *Dick*, and to enable his agent to return to *Dublin* on that day. If the Plaintiff thought fit to enter into a contract in such a state of circumstances, and under such conditions, it is his affair, and he must take the consequences. For it is always to be borne in mind that this is not a suit so set aside the contract, nor is it a suit to resist the specific performance of the contract; but it is a suit to take the accounts of what is fairly due to the Plaintiff under the contract then signed, having regard to all its modifications — taking into consideration the works already executed by the Plaintiff under the directions of the Defendant Mr. *Dick*, through his agent, Mr. *White*, and also taking into consideration to what extent, if any, this contract is to be construed with, or to be affected by, the previous estimate of the Plaintiff in March.

I therefore proceed now to examine the contract itself, and shall then consider what works were then, and have been since, executed by the Plaintiff under the directions of the Defendant *White*. This raises the question of the character in which Mr. *White* is to be considered in dealing with this case. And in doing so I am of opinion that I must treat Mr. *White* as the agent of Mr. *Dick*, generally, for all purposes connected with this building, and that without any limitation as to price or anything else. After careful examination, I can find no evidence to satisfy me that the Plaintiff was informed *that [18 Mr. *White's* authority as agent was, by any contract between him and his employer, Mr. *Dick*, distinct or otherwise, limited to the expenditure of £15,000 and no more.

I am of opinion that, however Mr. *White* might exceed that

amount, the Plaintiff had not any notice that as between him and Mr. *Dick* such excess would not have been recoverable from Mr. *Dick* by the Plaintiff, or that, whatever may have been the advantage derived by Mr. *Dick* from the original or extra works, the amount that the Plaintiff could recover was to be limited to £15,000. It may be that, as between Mr. *Dick* and Mr. *White*, Mr. *White* might not have been able to charge him with more than £15,000, and that Mr. *White* may have bound himself that no person employed by him should make any such charge against Mr. *Dick;* but unless distinct notice of such contract was given to that third person so as to bind him, and assuming, as I do, that the agency between Mr. *Dick* and Mr. *White* is established, then I am of opinion that the third person so employed is entitled to be paid what is really due to him from Mr. *Dick*, whatever, as regards Mr. *Dick* and Mr. *White*, may be the rights between them. These rights, if they should arise here, being a matter between co-defendants, I should be unable to deal with in this suit — at least in this stage of the suit.

According to the evidence before me, it was not till the 1st of January, 1869, that the Plaintiff became aware of the fact that a contract existed between the Defendants that the total expense of the building, and of all fittings and accessories, was not to exceed £15,000.

I come now to examine the contract signed by the Plaintiff on the 12th of June, 1867. [His Lordship then stated the purport of the contract and the arbitration clause, and continued:—] It is proper, and, in the present case, it is very material, to observe that this clause does not, in my opinion, give Mr. *White* the power of acting as judge in matters of difference which may arise between himself and the Plaintiff, however much the Defendant Mr. *Dick* may be interested in the same; but that this clause must be construed to mean the matters of difference between the Plaintiff and the defendant Mr. *Dick*, or between the plaintiff and some person connected with the works, 19] which matter in difference *cannot in any respect affect the interest of the Defendant Mr. *White*.

The materiality of this observation does not become sufficiently obvious without some further explanation. In an ordinary case, where no contract exists between the architect and the employer

to the effect that the outlay shall not exceed a given sum, no difficulty occurs : thus if a question arises as to the value of certain extra works executed by the builder, or a question arises as to whether certain works are or are not included in the contract, each of these is a question solely between the employer and the builder, and the builder has agreed and bound himself to abide by the decision of the architect on all such questions ; and accordingly he must abide the result and obey the decision of the architect, whatever it may be. But if, besides the contract between the employer and the builder, there is a contract between the employer and the architect that the outlay shall not exceed a given sum, and the builder is by the contract subject to the orders of the architect as to what works he shall execute, then, if such points as those above suggested arise, the question becomes one between the architect and the builder ; for, by the second contract, in no case can the employer be called upon to pay to the builder more than the sum agreed upon as the total outlay, without his being also entitled to deduct it from what he has to pay to the architect, or, if already paid, to recover it back from him. And then it is impossible that the builder can be bound by an undertaking that he would abide by the decision of the architect on all such questions, inasmuch as that undertaking has been entered into by the builder at a time when he was ignorant of the contract between the architect and the employer, and when he supposed that the decision of the architect would be impartial, unbiased, and not one in which he had himself a strong pecuniary interest.

I am of opinion, therefore, that the contract or engagement between Mr. *Dick* and Mr. *White* that the total outlay should not exceed £15,000 having been concealed from the Plaintiff, it completely annuls this proviso for referring all matters to the arbitration of the architect, so far as the Plaintiff is concerned. In order to make it binding it was essential that, before the Plaintiff entered into the contract with Mr. *Dick*, submitting to the arbitration of *Mr. *White*, he (the Plaintiff) should have [20 been informed of the contract subsisting between Mr. *White* and Mr. *Dick*, and of the strong interest Mr. *White* must necessarily have to decide against the Plaintiff all questions of value, and all questions of extra work, which could result in money to be paid to the Plaintiff. Accordingly it was Mr. *Dick*'s duty to

take care that this sub-contract was communicated to the Plaintiff as soon as possible, whether before or after the contract between the Plaintiff and Mr. *Dick*. Unless this contract between Mr. *Dick* and Mr. *White* was communicated to the Plaintiff and assented to by him, it has, in my opinion, the effect of erasing from the contract between the Plaintiff and Mr. *Dick* the whole of this proviso which relates to the arbitration of Mr. *White*.

Attached to this contract entered into by the Plaintiff were thirteen working plans and seventy-seven pages of specifications, every one of which the Plaintiff signed with his initials. It is admitted by the Defendant Mr. *White* that if the matter had been fully investigated it would have taken several weeks for the Plaintiff to have gone through them with accuracy; and there are various other proofs of the matter having been done in great haste.

But this Court is not called upon to annul the contract, it can only construe it; and Mr. *Kimberley* himself must bear the consequences of entering into a contract without sufficient consideration and reflection, when, as in this case, his signature was not obtained by any undue means.

With respect to the quantities given in March, 1867, on which the Plaintiff founded his estimate, it seems to me to be proved that in the working plans considerably larger quantities are given; and I am also of opinion that the Plaintiff, when he signed the contract, had not sufficient time afforded him to take out and to compare the quantities of each, and that probably a very considerable variation would have been made in the contract, as signed by the Plaintiff, had he perceived this; but then the Plaintiff should have stopped as soon as he discovered this, and he should not have gone on with the works under the contract in the expectation of something different from the contract being allowed to him; but he should either have required the alteration to be then made, or he should have repudiated the contract altogether. It therefore is only open to the
21] Plaintiff to insist on an inquiry into, and payment *for, what is not included in the works mentioned in the contract, and also for such variations as are provided for by the contract, and to be paid for these distinctly from, and in excess of, the lump sum for which the works included in the contract were to

be executed. That there are many such items is, as it appears to me, established by the evidence.

Besides this, it appears to me that in various other matters the Plaintiff is entitled to remuneration for which he has made claims which have not been allowed. It is too minute for me to go into the details, nor is it desirable that I should do so; but I feel — after an attentive perusal of the evidence and such examination as I am able to give to the plans, to the verbal promises made to the Plaintiff, and to the expectations held out to him by Mr. *White* — that I should be inflicting undue injury upon the Plaintiff if I were merely to dismiss his bill, and leave him to such remedy as he might have at law. At law, I am of opinion that the account would be too complicated to be taken in Court, that it would involve too many minute claims and counter-claims to be possible for it to be satisfactorily disposed of without a reference to arbitration, which, according to my experience, is usually one of the most dilatory and expensive of all tribunals. I am of opinion that the Court has jurisdiction to deal with this case, and that it is bound to do so.

I think, also, that there is evidence of an intention on the part of the Defendant Mr. *White* to bind the Plaintiff by his incautious adoption of a contract not in accordance with his tender, and to gain credit to himself for the cheap performance of a considerable architectural work of great merit, which circumstance might induce him to cut down the claim of the Plaintiff for extra work below what is equitable. Besides, the engagement entered into with Mr. *Dick* gives Mr. *White* a direct pecuniary interest to cut down all allowances to the Plaintiff. I repeat that in my opinion Mr. *White* must be treated as Mr. *Dick's* agent, and that any restriction of his authority by contract, between Mr. *Dick* and Mr. *White*, not communicated to the Plaintiff, cannot in any respect prejudice his rights; and in order to enable Mr. *Dick* to claim the benefit of the proviso that Mr. *White* was to arbitrate in all matters between him and the Plaintiff, it was essential that the fact of such contract between himself and Mr. *White* should have been communicated to *the Plaintiff previously [22 to his entering into any contract with Mr. *Dick* for the erection of the building, and the execution of the works in question containing such a proviso. It may unquestionably be true that this

may hereafter raise a question which may have to be settled between the co-Defendants, but I cannot deal with that now.

The consequence of all this is, that I think I must direct an account to be taken of all extra works executed by the Plaintiff under the direction of the Defendant Mr. *White*, and also an account of what, if anything, is due to the Plaintiff in respect of the works executed by him under the contract, the price of which is not included in the contract, and of the variation of the works included in the contract, where such variation has been made by the direction of Mr. *White*; that an account must be taken of what is due to the Plaintiff in respect of the matters aforesaid, and also an account of what is due from the Plaintiff in respect of any omission on his part in the performance of the contract entered into by him; and what, upon taking such account, shall be found to be due to or from the Plaintiff and to the Defendant Mr. *Dick*, shall be paid accordingly.

MINUTES:— Inquire whether the Plaintiff has executed for the Defendant *W. W. F. Dick*, by or under the direction of the Defendant *W. White*, any and what works which are not included in the contract, dated the 12th of June, 1867. Inquire whether the Plaintiff has executed for the Defendant *Dick*, under the said contract, any and what works, the price of which is not included in the said contract, or has made and executed by or under the direction of the Defendant *White* any and what variations in the works included in the said contract. Take an account of what, if anything, is due from the Defendant *Dick* to the Plaintiff in respect of the matters mentioned in the said inquiries respectively; also of what, if anything, is due from the Defendant *Dick* to the Plaintiff in respect of the contract price mentioned in the said contract of the 12th of June, 1867. Inquiry whether there have been any and what omissions on the part of the Plaintiff in the performance of the said contract of the 12th of June, 1867; and take an account of what, if anything, is due from the Plaintiff to the Defendant *Dick* in respect of such omissions. Adjourn further consideration. Liberty to apply.

Solicitors for the Plaintiff: Messrs. *Mackeson, Taylor, & Arnould*, agents for Messrs. *Kilby & Son, Banbury.*

Solicitors for the Defendants: Messrs. *Kinsey & Ade*; Messrs. *Waterhouse & Winterbotham.*

Where it is agreed that a third party shall fix the amount of compensation no action lies until it is fixed by him; *Morgan* v. *Birnie*, 9 Bing. 672 (23 Eng. C. L.); *Barton* v. *Hermance*, 11 Abb., N. S., 378.

Under an agreement to do work to the satisfaction of a third person, the plaintiff must aver and prove that it was done

M.R. Nov. 16, 1871.

*ATWELL v. ATWELL. [23

[Law Reports, 13 Equity Cases, 23.]

[1869 A. 23.]

Settlement — Power of Sale and Reinvestment — Proceeds of Sale, whether Realty or Personalty.

By a marriage settlement lands were conveyed to trustees to the use of all the children equally, and his, her, and their heirs and assigns, with power of sale, and a direction that the proceeds should be laid out in the purchase of other lands, or on government or real securities, which, when purchased, should be made liable to the same trusts, estates, and limitations as were declared of the trust premises. The lands were sold and the proceeds invested on mortgage —

Held, that the proceeds of the sale must be treated as personalty and not as realty.

Earlom v. *Saunders* (1) distinguished.

BY a settlement on the marriage of *Joseph Atwell* and *Elizabeth Atwell*, dated the 17th of October, 1814, certain real estate was

(1) Amb., 240.

to his satisfaction, and, if payment is to be made on the production of his certificate, that such certificate was given and produced; *Butler* v. *Tucker*, 24 Wend., 447; *Smith* v. *Briggs*, 3 Den., 73; *Smith* v. *Brady*, 17 N. Y., 175, 176; *Barton* v. *Hermance*, 11 Abb. N. S., 378; *Adams* v. *Mayor*, 4 Duer, 295; *Dustan* v. *McAndrew*, 44 N. Y., 72; *Stewart* v. *Ketcltas*, 36 id., 388; *Lamb* v. *Lathrop*, 13 Wend., 95; *Martin* v. *Leggett*, 4 E. D. Smith, 255; Kerr on Inj., 95, 96 (1st Eng. ed.); *Jones* v. *The President, etc.*, L. R., 6 Q. B., 115; *Williams* v. *Edwards*, 2 Simons, 78; *Rogers* v. *Hogan*, 58 Me., 306; *Wyckoff* v. *Meyers*, 44 N. Y., 143. See *Sherman* v. *Mayor*, 1 N. Y., 316; 4 Am. Law Times, U. S., Courts Rep., 6.

Unless the arbitrator decline to act at all; *Smith* v. *Brady*, 17 N. Y., 176.

Or act unreasonably or in bad faith; *Thomas* v. *Fleury*, 26 N. Y., 26; *Martin* v. *Leggett*, 4 E. D., Smith, 255; *Batterby* v. *Vyse*, 2 Hurl. and Colt., 42; *Wyckoff* v. *Myers*, 44 N. Y., 145.

Or the adverse party decline to allow him to act; or if in his employ to procure him to act after request; *McMahon* v. *Erie, etc.*, 20 N. Y., 463; *Dustan* v. *McAndrew*, 10 Bosw., 137; 44 N. Y., 72.

If the plaintiff procure the arbitrator to refuse to act, he cannot recover; *Stewart* v. *Cuyler*, 17 Barb., 482.

The plaintiff may recover the amount named by the arbitrator; *McIntyre* v. *Morris*, 14 Wend., 90, without further proof of the doing of the work, *Adams* v. *Mayor*, 4 Duer, 295; *Wyckoff* v. *Myers*, 44 N. Y., 143.

Provided both parties have notice of the time and place at which he intends to act and an opportunity to be heard; *McMahon* v. *Erie, etc.*, 20 N. Y., 463; *Collins* v *Vanderbilt*, 8 Bosw., 318, 320; but see *Dustan* v. *McAndrew*, 10 id., 130; 44 N. Y., 72.

If it be apparent from the contract that such notice and hearing were not contemplated, the decision of the arbitrator is final without the same; *Heron* v. *Davis*, 3 Bosw., 336.

conveyed to trustees to the use of *Joseph Atwell* for life, then to the use of his intended wife for life, if she should survive him, and after the decease of the survivor, then to the use of the children of the marriage, as the husband or the wife, if she should survive, should by will or deed appoint; and in default of appointment, then "to the use of all and every the child and children of the said intended marriage in equal shares and proportions as tenants in common, and his, her, or their heirs and assigns respectively;" and in case there should be no child or children of the said intended marriage, or there being such, they should happen to die during the lifetime of the said *Joseph* and *Elizabeth Atwell* before any of them should attain the age of twenty-one years, then to the use of the said *Joseph Atwell*, his heirs and assigns. And it was thereby provided that it should be lawful for the said *J. Atwell*, with the consent of the

Where the person to give the certificate is in the employ of one party, that party *contracts* with the other that such third person will do his duty and act fairly; *Batterby* v. *Vyse*, 2 Hurl. and Colt., 46, note, Johnson's Am. Ed.

Where a party agrees to do certain work and such extra work as may be ordered by a certain time in default of a certain sum as damages each day, and that the certificate of a third person shall be final, he must complete the work within the time specified, although the extra work ordered rendered it impossible for him to do so. It was his own folly to so contract; *Jones* v. *President, etc.*, L. R., 6 Q. B., 115.

So a contract may provide, that if the contractor do not proceed as rapidly as a third person shall deem proper, it may be terminated, and such third person shall fix the amount, if any thing, to be paid for what is done, or the employer may complete what is undone at the expense of the employee, who is bound to pay such expense; *Roberts* v. *Bury, etc.*, L. R. 5 C. P., 310; *Phelan* v. *A. & S. R. R.*, 2 Lans. 258; *Hennessy* v. *Farrell*, 4 Cush., 267; *Faunce* v. *Burk*, 16 Penn. St., 478, 479; *Pauling* v. *The Mayor, etc.*, 10 Exch, 753; but see *Ranger* v. *Great Western, etc.*, 5 H. L. Cas., 72.

Unless he was delayed from performing by the act or negligence of the other party; *Roberts* v. *Bury, etc.*, L. R. 5. C. P. 310, 325.

But an arbitrator can only settle such points as are expressly agreed to be referred to him, and his decision upon other points will not be binding; *Roberts* v. *Bury, etc.*, L. R., 5 C. P., 310; *Crowfoot* v. *London, etc.*, 2 Cromp. and Mees., 637.

He cannot fix the price of work not embraced within the contract; *Hart* v. *Lanman*, 29 Barb., 410.

If a contractor with a railway company agree to abide by the decision of an engineer he must do so, although the engineer be at the time a stockholder in the company; *Ranger* v. *Great Western, etc.*, 5 H. L. Cas., 72; or be the party in interest, *Dustan* v. *McAndrews*, 44 N. Y., 72.

Although a judge of a court of law could not have sat in such a case; *Dimes* v. *Grand, etc.*, 3 H. L. Cas., 759; 2 McN. and Gord., 285; Moak's Notes to Clarke's Chancery, 188, ed. 1869.

If an architect whose decision is made final by the terms of a contract be guilty of unfair conduct a Court of Equity will relieve the party injured thereby; *Pauley* v. *Turnbull*, 3 Giff., 70, *Ormes* v. *Beadel*, 2 Giff., 166.

trustees, to dispose of the said premises, provided that the purchase-money should be paid over to the trustees therein named, their heirs and assigns, to be laid out in the purchase of other lands and premises, or in government or real securities, which, when purchased, should be, and enure, and be made liable to the *same uses, trusts, estates, limitations, and provisoes as [24 were therein appointed or declared of and concerning the same premises.

The power of appointment contained in the settlement was not exercised. In 1821 the hereditaments comprised in the settlement were sold in exercise of the power contained in the settlement, and the proceeds of the sale, amounting to £1002 19*s.* 0*d.*, was laid out by the trustees on mortgage security, together with other moneys placed in their hands by the said *Joseph Atwell.*

There were nine children of the marriage, two of whom died before the property was sold.

Joseph Atwell survived his wife, and died in 1870, leaving several of the children surviving.

The suit was instituted by the Plaintiff, who was one of the children of the marriage, to carry out the trusts of the said settlement; and the question arose, on further consideration, whether there had been any conversion of the real estate, or whether the said sum of £1002 19*s.* 0*d.* was still to be treated as real estate. The heir-at-law of *Joseph Atwell*, who was heir-at-law of his deceased children, claimed to be entitled to their shares, if the proceeds of the sale were to be treated as realty.

Mr. *Caldecott*, for the Plaintiff, submitted that the sum in question must be treated as personalty.

Mr. *Bagshawe*, for a Defendant, in the same interest:—

In this case there was no obligation that there should be a reinvestment in land. The limitation to the children, "their heirs and assigns," merely gives them an absolute interest in the property; and as the land has been converted into personal estate, it must retain that character.

[He referred to *Walter* v. *Maunde* (1) and *Shipperdson* v. *Tower* (2).]

(1) 19 Ves., 424. (2) 1 Y. & C. Ch., 441.

Mr. *Begg*, for the heir-at law of *Joseph Atwell* and of his deceased children :—

In this case there has been no conversion of the real estate comprised in the settlement. The words of the settlement clearly 25] *indicated that it was the settlor's intention that in the event of a sale the proceeds should still retain the character of realty, the direction to reinvest in government or real securities only referring to a temporary investment, while the purchase of land was the ultimate object.

In *Earlom* v. *Saunders* (1) a testator devised lands to his wife for life, with remainder to his first and other sons in tail male, with remainder to *W.* and *P.* in fee, as tenants in common, and directed £400 to be laid out in the purchase of land or on any other securities as they should think proper, and directed that the lands to be purchased, and the securities on which the £400 should be laid out, should be made to and settled on the trustees, their heirs and assigns, to the same uses as the lands before devised. The intermediate limitations failed; *P.* died, and afterwards *W.*, under age. £400 not having been laid out in land, the question was whether it was now to be considered as realty or as personalty; and Lord *Hardwicke* held that the money was to be laid out on land and on securities till the land was purchased.

That was followed in *Cookson* v. *Reay* (2), where a sum of money, directed by will to be invested "in land or some other securities" for the benefit of one for life, with remainder to his children, but in failure of these to A. and his heirs, and which had not been invested in land, was held to have been originally impressed with the character of real estate, though by the subsequent dealing therewith by the parties interested in it, it had acquired the character of personalty.

Besides, under this settlement the word "heirs" is rather a word of purchase than of limitation.

Lord Romilly, M.R. :—

I do not think the words in the power of sale in this settlement have the effect of giving to the proceeds of the sale of the estate the character of realty. It is to be observed that

(1) Amb., 240. (2) 5 Beav., 22.

there was no compulsion on the part of the trustees to reinvest in the purchase of land. In the case of *Earlom* v. *Saunders*, Lord *Hardwicke* considered that the original uses could not be *carried out unless the character of realty was retained. [26 Here the word "heirs" is one of limitation, not of purchase. The trustees have altered the character of the property and converted it into personalty; and I am of opinion that it must be so treated.

Solicitor: W. B. *Brook*.

M.R. Nov. 18, 25, 1871.

*Morgan v. Britten. [28

[Law Reports, 13 Equity Cases, 28.]

Will—Construction—Gift to "all and every the child and children"—Joint Tenancy or Tenancy in Common.

A gift in trust for "all and every the child and children" of *A.* and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit:—

Held, to create a joint tenancy.

This was a Petition for payment out of Court of a fund which had been carried to a separate account in the suit.

The fund was bequeathed by the will of *John Downes*, dated the 25th of July, 1825, to trustees upon trust for his daughter during her life, and after her death in trust for "all and every her child *and children, and his, her, and their executors, [29 administrators, and assigns, for his, her, and their own absolute use and benefit."

Upon the death of the tenant for life, this Petition was presented by the surviving children, who claimed as joint tenants.

Mr. *A. T. Watson*, for the Petitioners, stated that he had been unable to find any authority precisely in point; and submitted that the gift created a joint tenancy.

Nov. 25. LORD ROMILLY, M.R., who had taken time to consider, said he was satisfied that it was a joint tenancy.

Solicitors: Messrs. *Wilde, Wilde, Berger, & Moore.*

V.-C.B. Nov. 3, 1871.

36] *SLEEMAN v. WILSON.

[Law Reports, 13 Equity Cases, 36.]

[1871 S. 187.]

Guardian and Ward—Testamentary Guardian—Illegitimate Children—Trustee and Cestui que Trust—Breach of Trust—Acquiescence.

A testator cannot by will lawfully appoint any one to be guardian of his illegitimate children.

A testamentary guardian is a trustee of such property as comes to his hands in that character.

A testator died in 1810 in *India*, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, *D. E.*, to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in *Ireland*. In 1811 *D. E.* obtained possession of the bond from the testator's executor; but he did not register it, nor did he (as it was stated and admitted on demurrer) ever takes any steps towards realizing the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when (as alleged and admitted on demurrer) the bond had become irrecoverable, *D. E.*, for the first time, informed the elder child and her husband, who were co-Plaintiffs, of the existence of the bond; and upon finding it was then too late to register it, he handed it to the male Plaintiff, directing him to see to it.

No step was taken until *D. E.'s* death in 1870, after which, in 1871 the bill was filed, seeking to make *D. E.'s* estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a Defendant.

Semble, D. E. was not at any time liable for any breach of trust; but if he was:—

Held, That the Plaintiffs, by acquiescing for thirty-eight years, and waiting till *D. E.'s* death, had lost their right to make any claim against his estate; and demurrer to the bill allowed.

Quære, whether the bill was not defective for want of parties.

DEMURRER.

The bill was filed by *Richard Quinn Sleeman* and *Ann Maria* his wife, against *Townsend Wilson*, *Arthur Thomas Stephens* (exe-

cutors of Sir *De Lacy Evans*), and *Robert Gleadowe Evans*, alleging to the following effect:—

Prior to September, 1810, the testator in the cause, *Henry Evans*, a major in the *East India Company's* service, advanced to his nephew *John Evans*, of *Limerick*, a sum of £2166 13*s.* 4*d*, for which amount **John Evans* entered into a bond with the tes- [37 tator, conditioned to be void on payment of double the amount and interest at £5 per cent, in the usual manner. He also signed a warrant of attorney for the like amount.

On the 14th of August, 1810, Major *Evans* made a will in the *East Indies*, whereby, after stating that he had two natural children, and that the mother was supposed to be then carrying a third child, he bequeathed the whole of his property "in *England*" at that time, or then "on the seas proceeding to *England*," to be divided equally between them (that was to say) if another child should be born of the mother of the other two in the proper time, that such child was to have one third of "such property in *England*, or proceeding to *England*," the property to be laid out in the funds or other public securities, and allowed to accumulate till the children should respectively attain the age of twenty-one years; deducting annually from the interest such portion as might be necessary for their education and their other expenses. Should either of the children die, the property to be divided between the other two, and in that —— the survivor to be the heir of the other two, provided one should live to the age of twenty-one years. The testator also declared that it was understood that each child attaining the age of twenty-one years was entitled to his or her third or half share, as the case might be. He also requested his friends *J. H. D. Ogilvie*, of *Madras*, *John Binney*, Esq., agent at *Madras*, to be his executors in *India*, and his friend *Cromwell Massey* to be his executor in *England*, and guardian to his children, jointly with *Richard Evans* and *Lacy Evans*, his two nephews.

The testator died in September, 1810, and his will was proved in *India*, and also in *England* by *Cromwell Massey* on the 15th of May, 1812.

The natural children of the testator referred to in the will were two, a girl named *Ann Maria*, who was the present female Plaintiff, and a boy named *Henry*; the mother had no other

child. In 1811 they came to *England*, and the bill alleged that, "immediately on their arrival, *Lacy Evans*, one of their testamentary guardians in the said will named, and who was afterwards known as General Sir *De Lacy Evans*, took upon himself, in his capacity of such testamentary guardian as aforesaid, 38] the entire and exclusive care and *control of the persons and property of" the two children, "and acted as their sole guardian."

In 1811, by *Cromwell Massey's* direction, the bond and warrant of attorney were delivered to Sir *De Lacy Evans* (as the bill alleged) "as such testamentary guardian of" the two children, "and the said Sir *De Lacy Evans* thus became, and was in fact, a trustee of the said debt of £2166 13*s.* 4*d.*, and the interest thereon, for the said infants." The bill proceeded to allege that in 1811 *John Evans*, the obligor of the bond, was seised of considerable real estate, and otherwise possessed of means amply sufficient to satisfy the debt and interest, but that Sir *De Lacy Evans* did not require or attempt to enforce payment; nor did he take any steps, either by registering the bond or otherwise, for making the debt a charge on *John Evans'* real estate; and that, "in consequence of the aforesaid neglect of" Sir *De Lacy Evans*, the debt "became, in the year 1831, irrecoverable, and no part thereof has been paid, and the same has been wholly lost."

In 1821 the female Plaintiff attained twenty-one, and some three years afterwards Sir *De Lacy Evans*, as the bill alleged, "furnished to her what purported to be an account of her share of" the testator's personal estate, "but in such account no mention was made of the said debt of £2166 13*s.* 4*d.*;" and no account was ever rendered to *Henry Evans*.

In 1832 the female Plaintiff married the co-Plaintiff, her present husband.

In 1833, "at which time," the bill alleged, the said bond debt was irrecoverable," Sir *De Lacy Evans* wrote to the Plaintiff *Richard Q. Sleeman* a letter stating that he had lodged in the hands of a Mr. *George Dartnell* (since deceased), a solicitor of *Limerick*, a bond of *John Evans* for upwards of £1000, which belonged, as he said, to *Ann Maria Sleeman* and her brother *Henry Evans*, and directing him, *Richard Q. Sleeman* to see to it.

The plaintiffs alleged that this was the first time that either of them heard of the existence of the bond. *Richard Q. Sleeman* applied to and obtained from Sir *De Lacy Evans* an authority to receive the instrument, and upon his applying for it, Mr. *Dartnell* said that Sir *De Lacy Evans* had given him (*Dartnell*) the bond to be registered in *Dublin*, but had done so many years too late for the *purpose, and that he (*Dartnell*) "could [39 do nothing with it; and he thereupon gave the said bond to the Plaintiff *Richard Quinn Sleeman*, who communicated the purport of the said Mr. *Dartnell's* statement to the said Sir *De Lacy Evans*, and he thereupon referred the Plaintiff *Richard Quinn Sleeman* to his brother, the said *John Evans*."

The Plaintiff *Richard Q. Sleeman* then ascertained that *John Evans* had been declared insolvent.

The bill then alleged as follows: "The Plaintiffs *Richard Quinn Sleeman* and *Ann Maria*, his wife, were not desirous of interrupting the friendly relations which existed between themselves and the said Sir *De Lacy Evans*; and for that reason only they took no steps to recover the said debt and interest from the said Sir *De Lacy Evans* during his lifetime."

John Evans died in 1845. *Henry Evans*, the brother of the female Plaintiff, died in 1866 intestate, never, as alleged, having been aware of the existence of the bond. His son, the Defendant *Robert Gleadowe Evans*, was the person entitled to administer to his estate.

Sir *De Lacy Evans*, having survived the two other persons named as testamentary guardians in the testator's will, died on the 9th of January, 1870.

This bill was filed on the 21st of July, 1871, against the first-named two defendants, his executors, stating and alleging as above, and praying for a declaration that Sir *De Lacy Evans* had committed a breach of trust in neglecting to take steps for the recovery of the debt secured by the bond, and to make the securities a charge on *John Evans'* real estate; and that Sir *De Lacy Evans'* estate might be decreed to make good to the Plaintiffs and the Defendant *R. G. Evans* the loss which had been occasioned by such breach of trust; with other consequential relief.

To this bill the Defendants, the executors, demurred, for want of equity and want of parties.

The Defendant *R. G. Evans* did not appear.

Mr. *Amphlett*, Q.C., and Mr. *Renshaw*, for the demurrer:—

The case of the Plaintiffs is, that, being first aware of their
40] rights *in 1853, they lay by until 1871, and did not bring this claim till after Sir *De Lacy Evans'* death.

It may be admitted that a testamentary guardian is liable to account for everything he may receive, but the testator could not confer upon anybody the *status* of testamentary guardian of his children, being illegitimate; so that Sir *De Lacy Evans*, if a guardian at all, became what may be called a guardian *de son tort*. At the utmost he was only a constructive trustee; he was not an express trustee of this bond; and even an express trustee will not be held liable after thirty-eight years' delay: *Smith* v. *Clay* (1), cited and followed by Sir *R. P. Arden*, Master of the Rolls, in *Pickering* v. *Lord Stamford* (2); *Beckford* v. *Wade* (3).

The suit is also defective; for if a decree be made, the representative of *Henry Evans*, who does not appear, may file another bill.

Twenty years has been held the limit of time within which a claim of this kind must be brought: *Rolfe* v. *Gregory* (4).

Mr. *Fry*, Q.C., and Mr. *Graham Hastings*, for the bill:—

The objection as to parties is groundless, since the passing of the 15 & 16 Vict. c. 86, s. 42.

As to time, this bond was a *chose in action* of the wife, not reduced into possession by the husband. Hence she was under disability, and time will not run against her. It cannot be said that because the husband might have reduced the property into possession, he must be treated as if he had done so.

Then it is said that Sir *De Lacy Evans* was only a constructive trustee, with a view, probably, to the *Statute of Frauds* (29 Car. 2, cap. 3, ss. 7, 8). But the demurrer admits the statement of fact in the bill that he acted as testamentary guardian; so that, if the law of *India* should be the same as that of *England* with respect to the inability of natural parents to appoint testamentary guardians, the fact remains that Sir *De Lacy Evans* did act as such guardian.

(1) Amb., 645, 3 Bro. C. C., 639, n.
(2) 2 Ves., 272, 282.
(3) 17 Ves., 87.
(4) 8 Jur. (N.S.), 606.

Then *Mathew* v. *Brise* (1), establishes that, "of all the property which he gets into his possession as guardian," a testamentary *guardian is "a trustee for the benefit of the infant ward," [41 and no time runs between a trustee and his *cestui que trust*.

The VICE-CHANCELLOR:—A testamentary guardian is a trustee of such property only as comes to his hands.

Mr. *Fry*:—Then the question is, what extent of possession is necessary to make the guardian a trustee. Sir *De Lacy Evans* kept the bond in his own possession from 1811 to 1833, without attempting to enforce, or even registering it. In 1831 it became irrecoverable, and then he waited two years before he informed the Plaintiffs of its existence. This neglect amounts to a breach of trust, against which the statute will not run: *Butler* v. *Foster* (2); and lapse of time alone is not a defence in this Court: *Woodhouse* v. *Woodhouse* (3).

The reluctance of the Plaintiffs to sue Sir *De Lacy Evans* himself, who was the nephew of their natural father, ought not to prejudice their remedy against his estate.

SIR JAMES BACON, V.C.:—

I think the demurrer must be allowed.

It is alleged by the bill that General Sir *De Lacy Evans* was appointed testamentary guardian of the testator's children, but the testator had no more power than any other person to appoint him guardian of these children. It has been suggested that there is some difference between the law of *England* and the law of *India* in that respect. I have no reason for supposing that that is so; but it is enough for the present purpose to say that there is no such allegation in the bill. The will of the testator, though made in *India*, deals with property in *England*, and must be governed by the law of *England*.

In strictness there is nothing whatever in the bill to show that General Sir *De Lacy Evans* was the guardian of these children; but if he was, his duty of guardian, as I gather from the bill, was faithfully and properly performed; for the bill alleges not only that he took on himself that office, but that, upon the lady attaining twenty-one, an account was rendered to her with which

(1) 14 Beav., 341, 345. (2) Law Rep., 5 Eq., 27. (3) Law Rep., 8 Eq., 514.

42] no fault *was found, and it is stated that in that account no mention whatever was made of the bond in question. The bond seems to have remained in Sir *De Lacy Evans'* hands until 1833, when he sent it to *Ireland* to a Mr. *Dartnell*, directing the Plaintiff Mr. *Sleeman* to see to it. Mr. *Sleeman* thereupon opened a communication with Mr. *Dartnell*, who told him that the bond had been given to him by General Sir *De Lacy Evans* to be registered, but that it was now too late for anybody to register it (I do not know that it was any part of General Sir *De Lacy Evans'* duty to register the bond), "and that he could do nothing with it; and he thereupon gave the said bond to the Plaintiff *Richard Quinn Sleeman*, who communicated the purport of the said Mr. *Dartnell's* statement to the said Sir *De Lacy Evans*, and he thereupon referred the Plaintiff *Richard Quinn Sleeman* to his brother, the said *John Evans*." The particular date of this does not appear; but it must have been in or after the year 1833. Therefore, fairly reading the bill according to its true purport, it appears that in year 1833, when it was ascertained that the bond could not be registered, it was still a bond available, although not registered, against *John Evans;* and Sir *De Lacy Evans* informed the Plaintiff that he must apply to the debtor, *John Evans*, for payment. That is the statement in the bill, and it appears, or seems to be an inference, that the Plaintiff acted on that; for the next statement is, that "the said *John Evans* at that time had been declared an insolvent under the statutes then in force for the relief of insolvent debtors," and that "his estate had produced, and would produce, no dividend for his unsecured creditors." I cannot conceive that up to that time General *Evans* had neglected any duty which properly belonged to him. I entirely adopt the authority of the case at the Rolls, which Mr. *Fry* cited, of *Mathew* v. *Brise* (1). It is not to be disputed that if a person appointed guardian, in that character possesses himself of any of his ward's property, of that property he becomes a trustee, although he is only a trustee by construction, and not appointed by name.

Here there is no suggestion that General *Evans* ever possessed himself of any part of the property of the Plaintiffs for which he did not account.

43] *But then comes this passage in the bill, which, in my

(1) 14 Beav., 341.

opinion, puts an end to the case, and places it decidedly within the plain doctrine of the Court, that persons who sleep on their rights or acquiesce in a state of circumstances in which their rights are lost sight of, cannot, after a lapse of time, enforce remedies which they might have had; although I do not think in this case they ever had any.

The statement to which I refer is extremely distinct and significant: "The Plaintiffs *Richard Quinn Sleeman* and *Ann Maria*, his wife, were not desirous of interrupting the friendly relations which existed between themselves and the said Sir *De Lacy Evans*; and for that reason only they took no steps to recover the said debt and interest from the said Sir *De Lacy Evans* during his lifetime." Now, what does that mean? They are apprised that the bond cannot be registered. They say they were acquainted with the fact that *John Evans* was an insolvent debtor and unable to pay; they were referred to *John Evans* by Sir *De Lacy Evans*, who must be taken to have repudiated all responsibility as to the bond; and then these relatives (who, though not legitimate, were still not improperly called relatives), because they do not wish to interrupt the friendly relations which existed between them and the man who, they now say, is their defaulting trustee, for all these years from 1833 to 1871, take no step whatever. If there can be a case of acquiescence, this is one of the strongest cases that can be suggested, and it furnishes an inference that there was some other reason than merely the friendly relations which existed for their not pressing Sir *De Lacy Evans*. If they had, in the year 1833, as they might have done, proceeded against Sir *De Lacy Evans*, alleging breach of trust, he, being then alive, might have been able to say what nobody can even guess at now; but they wait till Sir *De Lacy Evans* is in his grave before they raise anything like a question on this subject.

Upon the ground of acquiescence, therefore, it is that I decide this case; and I think, beyond all hesitation or doubt, that it is a case in which the demurrer must be allowed.

It accordingly becomes unnecessary to consider the other ground of demurrer; but if it had been necessary, I think I should have required to know more about the facts than appears from the statements in this bill before I came to the conclusion that the objection *for want of parties had been removed by [44

the Act of Parliament. But I do not trouble myself about that, because I decide this case solely on the ground of acquiescence. The demurrer must be allowed with costs.

Solicitors for the Plaintiffs: Messrs. *Deane & Chubb.*

Solicitors for the demurring Defendants: Messrs. *Stephens & Langdale.*

V.-C.B. Nov. 4, 7, 1871.

GREENE v. WEST CHESHIRE RAILWAY COMPANY.

[Law Reports, 13 Equity Cases, 44.]

[1870 G. 1.]

Specific Performance—Railway Company and Landowner—Agreement by a Railway Company to make Accommodation Works on Land of a Vendor other than that taken by the Company.

An agreement was entered into between a railway company and a landowner, part of whose land had been, under another agreement, taken by the company, whereby, in consideration of the previous withdrawal by the landowner of a Petition to Parliament against the company's bill, the company agreed to construct and forever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner:—

Held, that this agreement was not incapable of being enforced by a Court of Equity.

The Court will not refuse to decree specific performance of an agreement, although the Plaintiff may have a concurrent remedy in damages, or may have entered into a negotiation for a money compensation which has failed.

MOTION FOR DECREE.

By an agreement dated the 31st of December, 1861, and made between the Defendants, the *West Cheshire Railway Company*, under their common seal, of the one part, and the Plaintiff, *James Greene Hatton Greene*, of *Bellevue*, in the county of *Chester*, Esq., of the other part, after reciting that the company had obtained an Act of Parliament on the 11th of July, 1861, for incorporating the company, and for authorizing them to make and maintain certain railways; and that by the same Act the company were empowered to run through certain lands belonging to the Plaintiff; and that previously to the passing of
45] the Act the *Plaintiff petitioned Parliament against the bill

then pending; but that, in consideration of an agreement entered into between the provisional directors of the undertaking and promoters of the bill, and the Plaintiff, dated the 2d of May, 1861, the Plaintiff withdrew his petition; and that by the same agreement of May, 1861, it was agreed that, on the passing of their Act, the company should, if required, put their seal to an agreement embodying the terms of the agreement of the 2d of May, 1861; it was witnessed that it was mutually agreed between the parties as follows:—

"The said railway company shall construct, contemporaneously with the construction of the said railway, and for ever thereafter maintain, at their own proper expense, a sufficient siding of at least 100 yards in length alongside the line of railway, as constructed through the land of the Plaintiff, and upon land belonging to the Plaintiff, and to be provided by him for that purpose, for the use of and to the reasonable satisfaction of the Plaintiff.

"Every difference which shall arise between the parties to this agreement in regard to the preceding article, or as to the mode of carrying the same out, or otherwise touching the premises, shall be referred to and determined by arbitration between the said parties to this agreement, according to the provisions, with respect to the settlement of disputes by arbitration, of the *Companies Clauses Consolidation Act*, 1845."

By certain Acts of Parliament the second Defendants, the *Cheshire Lines Committee*, were authorized and empowered to construct and complete the line of railway and works of the first Defendants, the company; and in exercise of such powers they took, and proceeded to construct the line through, the Plaintiff's land.

On the 31st of July, 1868, the Plaintiff's solicitor wrote to the company's solicitors, informing them that he had received the Plaintiff's instructions to obtain a performance of the agreement, and that he should be glad to hear from them, as it was now time the siding was made, "as I am informed the railway is just being completed." In a second letter, dated the 3d of August, 1868, the Plaintiff's solicitor again called upon the company to carry out their part of the agreement with regard to the siding, adding, *"I hope there will be no difference be- [46

tween the parties upon which the necessity of an arbitration will arise."

On the 5th of August Defendants' solicitors in answer said: "We cannot see the urgent necessity there is to make the siding until our railway shall be nearly complete, and think that your client had better see our engineer on the spot to agree as to the manner of construction."

Other correspondence followed, which took the form of a negotiation for a money compensation; but all offers were expressly made without prejudice, and no agreement was come to. Finally, on the 5th of September, 1868, the company's solicitors wrote as follows: "We thought the siding of so little value to any one that we never imagined Mr. *Greene* would ask for it .... Frankly, we think the proposal of your client that we should pay to be let off making the siding is simply a means of extortion. We do not object to pay a small sum, say one-fourth of the estimated cost of the siding, but not more. This without prejudice."

On the 21st of October, 1869, a notice, dated the day preceding, signed by the Plaintiff, and addressed to both of the Defendants, was served upon each, which, as far as material, was as follows:—

"I, the undersigned, . . . hereby give you and each of you notice, that I require you, in pursuance of the undertaking in this behalf, on the part of the said railway company, contained in certain articles of agreement dated the 31st day of December, 1861, . . . forthwith to construct, contemporaneously with the construction of the said *West Cheshire Railway*, and before the same shall be opened for public traffic, and for ever thereafter to maintain at your or one of your own proper expense, a sufficient siding," &c. (following the exact words of the agreement): "And I further give you and each of you notice, that I have provided, and do provide and put at your disposal, such quantity of land belonging to me, adjoining and lying alongside and to the north-west of the said line of railway as constructed through my land, as shall be required for the proper construction of the said siding; and I do require and authorize you, and each or either of you, and you and each or either of your engineers, contractors, servants, and workmen, with or without

horses, wagons, and carriages, forthwith, and from time to time, to enter into and upon the same land, *or any parts or [47 part thereof, and thereon, or on some parts or part thereof, to construct such siding accordingly."

The bill was filed in January, 1870, stating as above; and that, notwithstanding service of the above notice, the Defendants refused to construct the siding, and intended, unless restrained, to open the line without so doing; and prayed for specific performance, and an injunction accordingly, against "the Defendants respectively, or some of them."

Shortly afterwards an injunction was moved for, and ordered to stand to the hearing.

Answers were filed by both Defendants in February, 1870, in similar terms, setting up the following defences: First, that the Plaintiff had not provided any land, and that as to the land mentioned in the notice, it was subject to a mortgage, and the mortgagees threatened to sell or foreclose, and refused to allow the Defendants to enter upon it; secondly, that they believed the Plaintiff had no occasion for the siding, and that, if constructed, it would be of no use to him, inasmuch as there were already two sidings and wharves within half a mile, which, being station sidings, possessed great advantages over a private one; and they submitted that it appeared from the correspondence and from the Plaintiff's conduct that his object was not to have a siding constructed according to the agreement, but to have a money payment in lieu of the same; thirdly, that, having regard to the nature of the agreement, a Court of Equity could not or would not decree specific performance of it; and, fourthly, that the Plaintiff's remedy, if any, was an action for damages.

The Defendants' evidence showed that on the 25th of October, 1869, their solicitors sent a copy of the notice to the solicitor of the mortgagees, who in acknowledging the receipt, observed that the siding would be of great benefit to the estate, and that it met with the approval of his clients, "to whom any compensation money must be paid." On the 28th of October, the Defendants' solicitors again wrote to the solicitor of the mortgagees, asking him, when he had further considered the the matter, to say whether his clients would decline to allow land to be used for the purpose of a siding.

A correspondence followed, in the course of which the solicitor of the mortgagees, on their behalf, at first declined to give 48] the *requisite authority for entry by the Defendants on the land; but at the close he withdrew the refusal, and declined, on behalf of the mortgagees, to be mixed up in the Chancery proceedings, or in any dispute between the Plaintiff and the Defendants.

On behalf of the Plaintiff it was denied that the mortgagees intended to sell or foreclose the land.

It further appeared from the evidence that at first, namely, before or up to August, 1869, the Plaintiff wished to have the siding on some land on the other side of the line, which was not in mortgage; but in or about that month he changed his mind and ever since he had insisted upon the Defendants constructing it on the mortgaged land.

Mr. *Amphlett*, Q.C., and Mr. *Townsend*, for the Plaintiff:—

The fact that a negotiation for a money compensation was entered into and failed, does not reduce this to a mere money claim.

The Plaintiff's delay, if any, in making his demand was in compliance with the Defendants' own request.

The conduct of the Defendants in interfering between the Plaintiff and his mortgagees was most unjustifiable.

The Plaintiff is entitled to specific performance, though he may have a remedy in damages: *Storer* v. *Great Western Railway Company* (1); *Lytton* v. *Great Northern Railway Company* (2); *Wilson* v. *Furness Railway Company* (3).

Mr. *Kay*, Q.C., and Mr. *Speed*, for both Defendants:—

The Court has, in too many instances, permitted demands to be enforced against public companies, which, as against individuals, would be considered extortionate.

Where there has been a negotiation for damages, it is a rule that the Court will not grant specific relief: *Senior* v. *Pawson*.[4]

But here specific relief cannot be applied. This is not an agreement to purchase land, only to withdraw opposition to a petition; and the company are called upon to make these works,

(1) 2 Y. & C. Ch., 48.
(2) 2 K. & J., 394.
(3) Law Rep. 9 Eq., 28.
(4) Ibid. 3 Eq., 330.

not on land purchased by them, but "upon land belonging to" the Plaintiff, and "to be provided by him for that purpose." If a *landowner contracts for accommodation works to be [49 constructed on the company's land, as in the cases cited on the other side, the Court can decree specific performance, but not where the works are to be done on the Plaintiff's land: *South Wales Railway Company* v. *Wythes* (1). The company could not obtain a decree compelling the Plaintiff to find the land; hence there is no mutuality. The finding of the land must be a matter of future arrangement, so that the contract is not complete. The parties, moreover, have contracted to refer any subject of dispute. Nor could the Plaintiff compel the Defendants to make a siding wherever he pleased; as, for example, in the middle of a cutting or an embankment, where the expense would be exorbitant. It must be made to his "reasonable" satisfaction. On all these grounds the Court will not act in this case, but leave the Plaintiff to his remedy in damages.

The Plaintiff's conduct shows that his object was compensation.

No specific performance has ever been, or, it is submitted, ought to be granted of such an agreement as this: *Buxton* v. *Lister* (2).

As the siding was to be made on the Plaintiff's land, he has only to make the siding himself and recover damages from the company. He can get communication with the railway by the powers of the *Railways Clauses Act*, 1845 (8 Vict. c. 20), s. 76.

[They also cited *Errington* v. *Aynesly* (3) *Flint* v. *Brandon* (4), and *Pollard* v. *Clayton* (5).

Nov. 7. Sir James Bacon, V.C.:—

I wholly disclaim the notion that a railway company is to be dealt with in this Court upon any other principles than those which would and ought to be applied to individuals. Their contracts are to be considered just as any other contracts; their rights and their obligations are in all respects the same as those

(1) 1 K. & J., 186; 5 D. M. & G., 880.
(2) 3 Atk., 383.
(3) 2 Bro. C. C., 341.
(4) 8 Ves., 159.
(5) 1 K. & J., 462.

of any members of the community. They possess certain privileges different from, and in some respects beyond, those of 50] individuals; but *while it is the duty of the Court to respect and to secure the enjoyment of those privileges, it is no less an imperative duty to take care that the powers with which the Legislature has entrusted them, and which are inherent in their constitution, are not so exercised as to protect them in doing wrong, or in escaping from the fulfillment of their lawful engagements.

Nothing can be plainer than the engagement entered into by the railway company which forms the subject of the present suit. The company desired to make a certain railway through, among others, the lands of the Plaintiff. He resisted this design. He petitioned Parliament — without whose authority the railway could not be made — against the bill which they had presented. Whether he would or would not have succeeded in his opposition cannot now be ascertained. The promoters of the company, however, were so moved by his opposition that they thought it prudent to come to terms with him. They proposed or agreed that, if he would permit them to acquire, under the terms prescribed by the statute (and which are the same as those applicable in all such like cases), so much of his land as they required for their undertaking, they would, in making their railway, make a siding out of that railway upon land belonging to the Plaintiff. The Plaintiff acceded to these terms, and relying upon the performance of the obligation thus assumed, withdrew his opposition. The bill passed. The company undertook, by an agreement under their common seal, to perform the promise of the promoters. They have taken such land of the Plaintiff as they required; the Plaintiff has performed his part of the contract; the company have made and opened their railway, and they now refuse to perform the other part of that contract, by force of which alone they acquired possession of the Plaintiff's land.

A more direct, wilful, and determined violation of a plain contract cannot be suggested. No excuse is offered for it — no suggestion that it is impracticable, or even that it is inconvenient, for the company to perform their part of the contract of which the Plaintiff has performed his; but what they say is, that the Plaintiff may, by an action at law, recover against them in

money such amount of damages as a jury may think he has sustained by their wilful breach of their contract; and, that, therefore, a Court of *Equity will not entertain the complaint. [51 I do not understand that the law, as administered in this Court, countenances any such defence. If that were the law, the great majority of the cases in which this Court has exercised its authority for the purpose of compelling specific performance of contracts might be readily disposed of, because in the great majority of cases a payment in money might satisfy the wrong which the breach of such contracts inflicts. But it would be a total departure from all principles by which the administration of this branch of the law has hitherto been guided, to hold that it is at the option of a man who has persuaded another to part with his rights upon a specific condition to say: "I can, but I will not, perform the obligation I have entered into; and instead of keeping faith, and honestly fulfilling my promise, I will leave you to take the chances of an action for damages, and reserve to myself the power of endeavoring to defeat your claim; and, instead of acknowledging your just rights, will compel you to receive, instead of them, such a sum as I may be able to persuade a jury will compensate you for the loss and injury and disappointment which my wilful wrongdoing may have occasioned to you." If this were said or done by an individual, the injustice would be too glaring to be endured; can it be less when it is done by a corporation? Is it because a joint-stock company cannot be affected by any conscientious principle, or any feeling of honor, or any fear of forfeiting the good opinion of others, that a different rule of law is to be applied to them than would be applicable to an individual? I am as unwilling as any one can be to enforce against a company obligations to which private persons are not subject; but I should be acting in direct opposition to what I am satisfied is not less the plain law than it is the plain honesty of the case, if I were to countenance, on the part of the company, so gross a violation of their duty as they are endeavoring to practise in this case.

The case of *Storer* v. *Great Western Railway Company* (1) appears to me to establish principles which are here directly applicable. It is said that the case may be distinguished in this

(1) 2 Y. & C. Ch., 48.

respect: that the work which the company had there undertaken to make, and the performance of which they endeavored 52] to evade, was to be *performed on their own land, while here the requisite work is to be performed on the Plaintiff's land. But the Plaintiff has undertaken, and is willing and able, to provide the requisite land, and the work to be done is merely a collateral continuation of that railway which the company have made upon land which was the Plaintiff's and which has become theirs only upon the condition that they would so continue their railway.

That there may be cases in which the Court may be unable to do full justice in the way of specific performance is true, and by the imperfection of the contract itself, the Court may be unable to effect that which it would wish to perform.

Such a case is presented in the case of the *South Wales Railway Company* v. *Wythes* (1), where, from the vague and fragmentary nature of several of the stipulations in the contract, the Court was unable to carry it into effect. But no such difficulty arises in the present case. The length of the siding is prescribed by the agreement. The land is provided. The company has nothing to do but to continue their rails into that land which the Plaintiff offers them. There is nothing vague or uncertain in the matter, and if they should be decreed to continue their railway by means of the siding they have undertaken to make, there can be no doubt of the power of the Court to enforce such a decree so as to ensure a full and specific performance of the contract.

The observations in *Wilson* v. *Furness Railway Company* (2) apply directly and forcibly to this case, and I avail myself of those observations in coming to my present decision.

I have not thought it necessary to observe more particularly upon part of the case which occupied a large portion of the Defendant's answer, and of the evidence which has been adduced. The Defendants, it appears, in furtherance of their design to evade the performance of their contract, endeavored to prevail upon the Plaintiff's mortgagees of the land on which the siding is to be made to withhold their assent to that use of the land. The attempt, which at first promised to be successful, failed when the mortgagees became acquainted with the true facts of

(1) 1 K. & J., 186; 5 D. M. & G., 880. (2) Law Rep., 9 Eq., 33, 34.

the case; and the only result is, that the Defendants have proved that, in their *endeavor to baffle the Plaintiff's just [53 demands, and to defeat his rights, they have not scrupled to resort to very unfair practices.

There will be a decree for specific performance in the terms of the first paragraph of the prayer of the bill; the Plaintiff undertaking to point out within one month the land on which the siding is to be made; either party to have liberty to apply; and the Defendants to pay the Plaintiff his costs of the suit, including the costs of the motion for injunction.

Solicitor for the Plaintiff: Mr. *Henry Smith.*
Solicitors for the Defendants: Messrs. *Cunliffe & Beaumont,* agents for Messrs. *Lingards & Rowell, Manchester.*

Nov. 6, 7, 10, 1871.

*Sykes v. Sykes. [56

[Law Reports, 13 Equity Cases, 56.]

[1871 S. 147.]

Devise of Estates for Life — Term of 500 Years — Devise of Estates in Tail — Trusts to raise a Sum of Money — Remoteness — Demurrer.

A testator in 1803 devised estates to his eldest son *R.* for life, with remainders to his grandson *R.* for life; to trustees to preserve contingent estates; to other trustees for 500 years upon certain trusts; to the first and other sons of his grandson *R.* in tail male; and in default of issue, to the second and other sons of his son *R.* in tail male; and in default of issue to his son *N.* for life; to the same trustees to preserve contingent estates; to the first and other sons of *N.* in tail male; with remainders over in favor of other sons for life and their issue in tail.

The limitation of the term was for the purpose of enabling the trustees, by mortgage or otherwise, in case any one or more of the testator's younger sons, or their issue, should become seized in possession by virtue of the limitations of the estates devised to his son *R.* for life, with remainders over, to raise a sum of £5000 for the benefit of such of the testator's sons (except the son in possession of the estates) as should be then living, or their issue.

The testator's eldest son had no son other than the testator's grandson R., who died on the 24th of February, 1870, without issue, and the estates devolved upon the infant Defendant, a grandson of the testator's son *N.*

The Plaintiffs were a younger son of *N.*, and the son of the testator's younger son *H.*:—

Held, on demurrer to a bill praying a declaration that according to the true construction of the will, and in the events which had happened, the sum of £5000 was validly charged upon the estates, and was now raiseable with interest at 4 per cent. from the 24th of February, 1870, that the charge failed for remoteness.

Case v. *Drosier* (1), followed.

JOSEPH SYKES, who died in November, 1805, by will, in June, 1803, gave and devised to his eldest son *Richard Sykes* and his assigns, certain manors, tenements, and hereditaments, situate in the county of *York*, to hold the same to the use of his son *Richard* and his assigns during his life, without impeachment of waste; and from and after the decease of his son *Richard* to the use of his grandson *Richard Sykes*, the eldest son of his son *Richard*, and his assigns during his life, without impeachment of waste; and from and after the determination of that estate to the use of his nephews the Rev. *Thomas Francis Twigge* and
57] the Rev. *Miles Popple*, and *their heirs, during the life of his said grandson, upon trust to preserve the contingent estates thereinafter limited; and from and after the decease of his said grandson to the use of *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns, for the term of 500 years thence next ensuing, upon such trusts, nevertheless, and subject to such provisoes as were thereinafter expressed; and from and after the end or sooner determination of the said term, and in the meantime subject to the trusts thereof, to the use of the first son of the body of the said grandson lawfully to be begotten, and the heirs male of the body of such first son; and for default of such issue, to the use of the second, third, and all and every other the son and sons of the body of his said grandson, severally and successively, according to priority of birth, and the heirs male of the body and bodies of all and every such son and sons; and for default of such issue, to the use of the second, third, and all and every other the son and sons of his son *Richard*, according to priority of birth, and the heirs male of the body and bodies of all and every such son and sons; and for default of such issue, to the use of his son *Nicholas* and his assigns during his life, without impeachment of waste; and from and after the determination of that estate to the use of *Thomas Francis Twigge* and *Miles Popple*, and their heirs, during

(1) 2 Keen, 764; 5 My. & Cr., 246.

the life of his son *Nicholas*, upon trust to preserve the contingent estates thereinafter limited; and from and after the decease of his son *Nicholas*, to the use of the first son of the body of his son *Nicholas*, and the heirs male of the body of such first son; and for default of such issue, to the use of the second, third, and all and every the son and sons of his son *Nicholas*, according to priority of birth, and the heirs male of the body and bodies of such son and sons; and for default of such issue there were limitations of the same estates in favor of his sons *Daniel*, *Henry*, and *John*, and their sons successively, in terms similar to those expressed in regard to his son *Nicholas* and his sons; and for default of such issue a limitation to the use of his daughter *Marianne Thornton* and her assigns, during her life, without impeachment of waste, with divers remainders over.

After making certain pecuniary and specific bequests, the testator devised other estates to the use of his son *Daniel* and *his assigns during his life, and after the determination of [58 that estate, to the use of *Thomas Francis Twigge* and *Miles Popple*, and their heirs, during his life, to preserve contingent remainders; and after the decease of his son *Daniel* to the use of *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns, for the term of 500 years thence next ensuing, upon such trusts as were thereinafter expressed concerning the same; and from and after the determination of the said term of 500 years, and subject to the trusts thereof, to the use of the first son of the body of his son *Daniel*, in tail male, with remainder to the use of the second, third, and all and every other the son and sons of the body of his son *Daniel*, according to priority of birth, in tail male. As to these estates, there were remainders to the use of the testator's sons *John*, *Nicholas*, *Henry*, and *Richard*, and their sons successively, in terms similar to those expressed in regard to his son *Daniel* and his sons, with remainders to the use of the testator's grandson *Richard* during his life; and of the trustees; of the sons of such grandson successively; and of his daughter *Marianne Thornton* during her life with divers remainders over.

After empowering each of his sons, when seised in possession of the hereditaments and premises so limited to him for life, to make a settlement by way of jointure upon his wife, and empowering his grandson *Richard*, during the lifetime of his father

and before he came into possession of the estates so limited to him for life with remainders over, to make a settlement by way of jointure upon his wife of any competent part of the said estates; the testator, as to, for, and concerning the said two several terms of 500 years thereinbefore devised to *William Bourne* and *Thomas Thompson*, declared that the same were so respectively devised to them upon the trusts and for the ends, intents, and purposes thereinafter mentioned; that was to say, that in case any one or more of his younger sons, or their respective issue, should become seised in possession by virtue of the limitations of the hereditaments and premises thereinbefore devised to the testator's said son *Richard* for his life, with remainders over for want of issue male of his body, upon trust that *William Bourne* and *Thomas Thompson*, their executors, administrators, 59] and assigns should, by mortgage *and demise of the said term of 500 years, of and in the said premises, or a competent part thereof, or by such other ways and means respecting the same as they should be advised, raise, levy, or borrow the sum of £5000, and pay and apply the same to and amongst such of the testator's sons (save and except such son as should be seised in possession) as should be then living, or their issue if dead, such issue to take the respective shares of their parents, in equal proportions if more than one; but if only one, to such only son or his issue. There was a provision that in case the hereditaments and premises above devised to his son *Richard* for life, with remainders over, as well as those devised by him to his son *Daniel* for life, with remainders over, should, by virtue of the foregoing limitations, devolve upon any one of his sons, his will was that such son, or his issue, in case there should be more than one of his sons then living, should be entitled to only one of the entailed estates at his election, and the other should go to and devolve upon the next in succession or his issue. But in case both the said estates above devised to his sons *Richard* and *Daniel* respectively for life, with remainders over, should devolve upon one only surviving son or his issue, then upon trust that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by the ways and means aforesaid, levy and raise or borrow the further sum of £6000, and pay and apply the same to and amongst the female issue, if any, of his sons in equal proportions, save and except the female issue of such son,

upon whom the estates should devolve in manner above mentioned: and there were other provisions whereby he declared his will to be that in case the hereditaments and premises devised by him to his son *Richard* for life, with remainders over, should, by virtue of the foregoing limitations, devolve upon his son *Nicholas*, or any son of his son *Nicholas*, then upon trust and his will was that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by the ways and means aforesaid, levy and raise the further sum of £16,000, and pay and apply the same to and amongst the children of his son *Nicholas*, save and except such son upon whom the estates should devolve by virtue of the foregoing limitations, in equal shares and proportions; that in case his son *Daniel* should have issue male, and also one or more other child or children, whether *sons or daughters, or leave issue only one child, and that a [60 daughter, then upon trust and his will was that *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns should, by the ways and means above mentioned, raise and levy or borrow the sum of £5000 upon security of the hereditaments and premises above devised to his son *Daniel* for life, with remainders over, and pay and apply the said sum of £5000 to and amongst such children (if more than one) except an eldest son; or to such only child (if a daughter) at such time and in such manner and proportion as his son *Daniel* should, by deed or will, appoint; and for want of such appointment, then equally amongst such children (except as aforesaid) if more than one, and if an only daughter, to such only daughter; and that as soon as the several sums of £5000, £6000, £16,000, and £5000 should, upon the events and contingencies aforesaid, be raised in manner above mentioned; or in case the same, upon the events aforesaid, should be paid, or with the approbation of *William Bourne* and *Thomas Thompson*, their executors, administrators, and assigns, should be secured by such person or persons as for the time being should be next in remainder expectant on the two several terms of 500 years, according to the true meaning of that his will, then and in either of those cases, and at all times thenceforth, the said several terms of 500 years should cease, determine, and be utterly void, anything therein contained to the contrary thereof notwithstanding.

By a codicil dated in December, 1803, the testator appointed

William Joseph Denison to be a trustee of his will in the place of *Thomas Francis Twigge*.

Upon the testator's decease his eldest son, *Richard Sykes*, entered into possession of the settled estates devised to him for life, and he continued in such possession until his death on the 3d of March, 1832. The testator's grandson, *Richard Sykes*, the only son of *Richard Sykes* the son, upon the death of his father, entered into possession of the said estates, and continued in such possession until his death on the 24th of February, 1870, without having ever been married.

The testator's son, *Nicholas Sykes*, died on the 29th of April, 1827. He had thirteen children, of whom the Plaintiff *Daniel Sykes*, a younger son, and three daughters, only were living.

61] **Joseph Sykes*, the other Plaintiff, was the only son of the testator's son *Henry*, who died in 1844.

The eldest son of *Nicholas* died a bachelor; but his second son, *Joseph*, who died in 1857, had ten children, the eldest son of whom died a bachelor; but the second son, who died in 1865, had three children, and the eldest, viz., *Charles Percy Sykes*, an infant, was the Defendant.

The Plaintiff *Daniel Sykes* was now the sole trustee of the 500 years' term first above mentioned.

The Defendant was by his guardians in possession of the estates which were settled upon *Richard Sykes* for life, with remainders over, and upon his entering into such possession it was considered, on behalf of the persons claiming to be interested in the first-named sum of £5000 directed to be raised under the trusts of the said 500 years' term, that the time had arrived for raising it, and they accordingly applied to the Plaintiff *Daniel Sykes* as the present termor, and requested him to take the necessary steps for that purpose; but on the part of the Defendant an objection was raised that such charge was too remote and void, and that the sum could not now be raised; and thereupon the Plaintiffs, in June, 1871, filed this bill praying for a declaration that, according to the true construction of the will, and in the events which had happened, the sum of £5000, charged by the will upon the estates devised to the testator's son *Richard* for life, with remainders over in default of issue male of his body, was validly and effectually charged upon those estates, and was now raiseable out of the rents and profits

of those estates, or by sale or mortgage of a competent part thereof for the residue of the term; and that proper directions might be given for raising the same with interest at £4 per cent. from the 24th of February, 1870, until payment.

The Defendant demurred for want of equity, and the demurrer now came on for argument.

Mr. *Bristowe*, Q.C., Mr. *Ramadge*, and Mr. *Graham Hastings*, for the Defendant:—

The contingency on the happening of which the £5000 was to be raised is too remote. In *Case* v. *Drosier* (1) there was a term of *500 years, out of which charges were to be raised [62 by the trustees antecedent to the estate tail, and the Master of the Rolls said the testator had directed the sums to be raised on the failure of issue, which might be at a very remote period, and there were no means by which the charges could be barred, as they depended on a term which was precedent to the estate tail; so that after a recovery they would remain a term and a trust to be performed — a trust which could not be defeated, and a term which could not be destroyed. In that case the demurrer was allowed. Here there is no gift of the £5000 except in the declaration of the trusts of the term. It may be contended that if the sons of *Richard Sykes* the grandson, or the younger sons of *Richard Sykes* the son, barred the entail, they would thereby prevent the contingency from happening on which the £5000 was raiseable, and that therefore the charge of the £5000 was not open to any objection on the ground of remoteness. The general rule, however, is, that if an executory limitation does not necessarily vest within a life in being and twenty-one years afterwards, it is void for remoteness. Sometimes it has been said that there is an exception to the rule in cases where the executory limitation comes after an estate tail — that it is not obnoxious to the rule against perpetuities, because the entail can be barred; but the destructibility of a limitation is not a test as to whether it is or is not void for remoteness, and notwithstanding there are cases in which that could have been done, yet it has constantly been held that a series of contingent life estates were void; and their destructibility did not necessarily prevent the limitations being open to the objection

(1) 2 Keen, 764; 5 My. & Cr., 246.

of their being void on the ground of remoteness. It is submitted that the Court will follow this rule, gathered from the authorities, unless it can see something clear and distinct in the language of this will to enable it to say that the contingency is not too remote. The question always is,—Is there anything in the limitation which trenches upon the rule of law against perpetuities?—the rule which does not allow of a limitation of successive contingent estates for life, nor of accumulations during a period tending to a perpetuity: *Seaward* v. *Willock* (1); 63] *Lade* v. *Holford* (2); *Marshall* v. *Holloway* (3); *Lord Southampton* v. *Marquis of Hertford* (4): *Browne* v. *Stoughton* (5); *Scarisbrick* v. *Skelmersdale* (6); *Turvin* v. *Newcome* (7); *Sanders* on Uses and Trusts (8).

These cases show that the trusts would have been barred at once if the tenant in tail had barred the entail, and also that destructibility is not a test as to whether limitations are void for remoteness. Sometimes it has been questioned whether even the barring of the entail would destroy the trusts of the term; *Peacocke* v. *Parres* (9); *Collingwood* v. *Stanhope* (10). Before the statute 8 & 9 Vict. c. 112, this term would have still subsisted. The term in this case has not been destroyed by any tenant in tail. Next, taking the whole context of this will, and looking at the pedigree, it cannot be contended successfully that the event has arisen on which the £5000 is to be raised; for there can be no doubt that "issue" means "children:" *Martin* v. *Holgate* (11); *Lanphier* v. *Buck* (12). The term in itself, if good in other respects, would not now be a good term, even assuming that the question of remoteness had not to be considered, and that no estate was now vested for the purpose of raising the £5000. It is therefore submitted that on these different grounds, and considering the broad principle laid down in *Case* v. *Drosier* (13), this demurrer must be allowed.

(1) 5 East, 198.
(2) Amb., 479.
(3) 2 Sw., 432.
(4) 2 V. & B., 54.
(5) 14 Sim., 369.
(6) 17 Ibid., 187.
(7) 3 K. & J., 16.
(8) Vol. i. 5th Ed. pp. 202–203, n.
(9) 2 Keen, 689.
(10) Law Rep., 4 H. L., 43.
(11) Ibid., 1 H. L., 175.
(12) 2 Dr. & Sm., 484.
(13) 2 Keen, 764; 5 My. & Cr., 246.

Mr. *C. Hall*, and Mr. *North*, for the Plaintiffs:—

This is a good trust, and the sum of £5000 is now raiseable. The Plaintiffs are the only two persons who, in the events that have happened, are entitled to take. The term is a perfectly good legal term. Where it is desired to provide for additional portions for daughters, it is usual to create a term after the estate tail, and then to declare the trusts. The question is, whether it is actually necessary, for the purpose of giving validity to a charge upon an estate, to have a separate and independent term limited immediately after the limitation of an estate tail, or whether there may *not be an express trust [64 declared and limited of a term antecedent to the estate tail, so that it shall be equally effectual and operative — the charge itself being so limited that it never could have been raiseable if any preceding tenant in tail had barred the entail. The question here is one of intention, and the testator seems to have intended to avoid the error which was fallen into in *Case* v. *Drosier* (1). In *Eales* v. *Conn* (2) an estate was by deed limited to the husband for life, with remainder to trustees for 500 years, for raising portions for younger children, with remainder to the sons of the marriage in tail. There was issue a son and a daughter, who died an infant in her mother's lifetime. The son attained twenty-one, and suffered a recovery, but that did not defeat the charge. In this Court, in considering the validity or invalidity of the term, the intention must be looked at separately. This is a case in which the testator has carefully said that this sum of £5000 is only to be raised in case any one or more of the younger issue shall become entitled under the limitations. All tenants in tail have, on coming into possession, dominion over the estate; and the term being in the nature of a remainder after preceding limitations in tail, it was always capable of being destroyed: 3 & 4 Will. 4, c. 74, s. 15; and therefore is not open to the objection on the ground of perpetuity. The cases which have been cited to show that destructibility is not a sufficient test are cases entirely of a special class and description; and those of *Peacocke* v. *Pares* (3) and *Collingwood* v. *Stanhope* (4) were cases of construction, and came within

(1) 2 Keen, 764; 5 My. & Cr., 246.
(2) 4 Sim., 65.
(3) 2 Keen, 689.
(4) Law Rep., 4 H. L., 43.

the same class. The question here is simply one of construction, to be taken in connection with and having regard to the special rules which this Court always applies and adopts in considering the language of instruments in reference to provisions for younger children. The case of *Martin* v. *Holgate* (1) is certainly not applicable, for here a great-grandson of the testator has come into possession, and there are objects to take — those objects being the testator's sons or their children; and so far as regards personal capacity, there can be no objection in point of law. The other cases cited have no application to the question

65] before the Court. It is *submitted that the sum of £5000 is clearly raiseable under the trusts of this term, and that the demurrer ought to be overruled.

[They also referred to *Fazakerly* v. *Ford* (2), *Caldwell* v. *Cresswell* (3), and *Harrison* v. *Round* (4).]

Mr. *Bristowe*, in reply, referred to *Davidson's* Precedents (5), and submitted that *Eales* v. *Conn* (6), so far as it was applicable, was in favor of the Defendant's contention; and that it was very difficult to distinguish the case from that of *Case* v. *Drosier* (7).

Nov. 10. Sir John Wickens, V.C.:—

It seems to me, on consideration, that this case is undistinguishable in principle from that of *Case* v. *Drosier*. That case is one of the highest authority, from the care with which it was argued, and the Judges by whom it was decided.

It may be observed that the construction assumed by both Judges as the true construction of the limitation there, and by virtue of which it becomes applicable here, has been since established as the correct one by the decision of the House of Lords in the case of *Baker* v. *Tucker* (8).

That being so, I ought not, I think, to go into the general question of principle, which, but for the decision in *Case* v.

(1) Law Rep., 1 H. L., 175.
(2) 4 Sim., 390.
(3) Law Rep. 6 Ch., 278.
(4) 2 D. M. & G., 190.
(5) Vol. iii, p. 930, last Edition.
(6) 4 Sim., 65.
(7) 2 Keen, 764; 5 My. & Cr., 246.
(8) 3 H. L. C., 106.

Drosier, might have been a very nice one; nor to seek to distinguish the present case from it on grounds which, if they had existed in it, would not, as I read the judgments of Lord *Langdale* and of Lord *Cottenham*, have altered their decisions. The demurrer must therefore be allowed.

Solicitors: Messrs. *Westall & Roberts*, agents for Messrs. *Thompson & Cook, Hull;* Messrs. *Evans & Foster*.

Nov. 22, 1871.

*Ashton v. Corrigan. [76

[Law Reports, 13 Equity Cases, 76.]

[1871 A. 10.]

Agreement to execute Mortgage — Specific Performance.

Where the Defendant had agreed to execute to the Plaintiff a mortgage of certain leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage:—

The Court made a decree for specific performance.

This bill was filed for the purpose of compelling the Defendant to execute a mortgage to the Plaintiff of certain leasehold premises pursuant to an agreement dated the 20th of August, 1870, by which the Defendant, in consideration of a sum of money then due from him to the Plaintiff, charged certain long leasehold premises with the repayment of that sum and interest, and agreed that he (the Defendant), his executors, administrators, or assigns, would at any time thereafter, at the request of the Plaintiff, his executors, administrators, or assigns, at his own cost, execute to him or them a mortgage of the premises in the usual form, containing an absolute power of sale, and all the usual trusts, powers, and covenants, subject to all prior charges. The Defendant was called upon to execute a mortgage, but he failed to keep an appointment for that purpose, and he had returned no answer to the communications which had been addressed to him on the subject.

Mr. *Oadman Jones*, for the Plaintiff, asked for a decree, and 77] *referred to *Jones* v. *Greatwood* and *Fraser* v. *Thomas*, referred to in *Seton* on Decrees (1).

An appearance had been entered for the Defendant, but no one appeared for him in court.

Sir John Wickens, V.C.:—

I doubt whether a contract to execute a mortgage, which the mortgagee may enforce by a sale the day after its execution, is one which the court will specifically perform; and I know of no reported case in which such relief has been given where the right to it has been contested. However, on the authority of the cases cited from *Seton* on Decrees, I will make the decree.

Solicitors: Messrs. *Robinson & Preston.*

As to specific performance of an agreement to execute a mortgage see qat vs. Marquat, 7 How. Prac., 417, 12 N. Y., 336, Rider vs. Pond, 19 N. Y., 262. De Rerres vs. Thorn, 4 Bosw., 266, Mar-

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V.-C.W. Nov. 6, 1871.

Leese v. Martin.

[Law Reports, 13 Equity Cases, 77.]

[1871 L. 146.]

Partners — Appearance — Substituted Service.

In a suit against five partners, three of whom had entered appearance and the other two were out of the jurisdiction and had not, substituted service of a notice of motion for an injunction, and for the appointment of a receiver on any of the three partners for the two, was allowed.

The Defendants, five in number, were bankers carrying on business in partnership, in *Lombard Street*, and the suit had reference to deeds deposited at the bank; the question being whether they were left with the Defendants for safe custody, or to secure the repayment of moneys advanced.

(1) 3d Ed., 448, 443.

Three of the Defendants had entered appearance, and the other two, who were out of the jurisdiction, had not.

Mr. *Ingle Joyce*, for the Plaintiff, said it was intended to move, on the next motion day, for an injunction, and for the appointment of a receiver; and asked for leave to serve the bill with a notice *of motion upon any of those partners who had ap- [78
peared to the bill.

He referred to *Carrington* v. *Cantillon* (1) *Coles* v. *Gurney* (2) *Kinder* v. *Forbes* (3), and *Morgan's* Orders (4).

Sir J. Wickens, V.C., gave leave for substituted service.

Solicitor: Mr. *John Frost.*

M.R. July 24, 25, 26, 27, 28; Aug. 2, 4; Nov. 6, 1871.

*Peek v. Gurney. [79

[Law Reports, 13 Equity Cases, 79.]

[1868 P. 52.]

Company — Prospectus — Concealment of Material Fact — Liability of Directors — Rights of Allottee of Shares — Rights of Transferee — Delay.

Directors of a company issuing a prospectus are bound to disclose every material fact; and if they do not they will be held liable to indemnify any person who takes shares from the company on the faith of the prospectus against any loss which may be occasioned to him by reason of such concealment, even although they may have believed that the concealment will be beneficial to the persons induced to take shares.

A fact which, if disclosed would have so discredited the company as to prevent its formation, is a material fact within the meaning of the foregoing proposition.

The estate of a deceased director is liable in equity in respect of such indemnity to the same extent as the director would have been if living.

A transferee of shares has no greater right to be indemnified by the directors in respect of their misconduct in issuing a prospectus than the original allottee would have had; and if the allottee would have been debarred of his remedy against the directors by laches, condonation, or otherwise, the transferee is also debarred of remedy.

(1) Bun., 107.
(2) 1 Madd., 187
(3) 2 Beav., 503.
(4) 4th Ed., p. 420.

Any person seeking relief against directors of a company in respect of misconduct in issuing a prospectus is bound to come promptly for relief.

In July, 1865, the directors of a company formed to take over the business of a firm which they knew to be insolvent, issued a prospectus in which the fact of such insolvency was withheld from the public. If the fact had been disclosed the company would not have been formed. The directors withheld the fact, honestly believing that the speculation on which they were about to embark would be successful.

In October and December, 1865, the Plaintiff, on the faith of the prospectus, bought in the market shares which had originally been allotted to a partner in the insolvent firm. In May, 1866, the company stopped payment, and was afterwards wound up, and the Plaintiff after considerable litigation was settled on the list of contributories, and was compelled to pay large sums in respect of calls. In March, 1868, the Plaintiff filed the bill in this suit, seeking to be indemnified in respect of his losses by the surviving directors, and the estate of a deceased director:—

Held, that if he had been an original allottee and had come in due time, he would have been entitled to such indemnity; but that he was debarred of his remedy on the ground, first, that he was in no better position than the allottee from whom he bought, and, secondly, that he had come too late for relief.

For many years previously to 1865, a firm of bill brokers and money dealers carried on business in the City of London under 80] the *style of *Overend, Gurney, & Co.* The business so carried on was probably the largest of its kind in the commercial world, and the firm had a very high and widespread reputation. Three-fourths of the business was owned by certain persons known as the *London* partners; the remaining fourth was owned by certain persons known as the *Norfolk* partners, being in fact the partners in a banking business carried on at *Norwich* and elsewhere in *Norfolk*.

In 1865 the *London* partners were *Samuel Gurney*, *Henry Edmund Gurney*, *David Ward Chapman*, and *Robert Birkbeck*; and the *Norfolk* partners were *Daniel Gurney*; the said *Samuel Gurney* and *Henry Edmund Gurney*; *John Henry Gurney*, *Francis Hay Gurney*, *Henry Birkbeck*, *William Birkbeck*, *Charles Henry Gurney*, and *Somerville Arthur Gurney*.

It now appeared that this firm, notwithstanding its reputation, had in the years subsequent to 1857 sustained great losses. These did not arise from any diminution in the money-earning power of the legitimate business of the firm, but were mainly occasioned by large advances being made on insufficient security to firms and companies engaged in business of a speculative and hazardous description. In 1865 these losses occasioned

serious anxiety to the partners, and led them to desire the introduction of fresh capital into the firm. For this purpose, they in the first instance made applications to their relations, many of whom were wealthy, and had large sums of money at their disposal; but ultimately it was seen that the amount required was too great for the resources of the private friends of the partners.

Four gentlemen, named *Henry Ford Barclay*, *Thomas Augustus Gibbs*, *Harry George Gordon*, and *William Rennie*, all of whom were of high standing in the City of *London*, were then consulted, and the affairs of the firm were fully disclosed to them; and it was determined to form a joint stock company for the purpose of taking over and carrying on the business of the firm. Accordingly, on the 12th of July, 1865, a joint stock company, named *Overend, Gurney, & Co., Limited*, was duly registered under the *Companies Act*, 1862, with a capital of £5,000,000, divided into 100,000 shares of £50 each. The memorandum of association of the company provided as follows:—

"3d. The objects for which the company is established are the *receiving of money on deposit, or by re-discount of [81 bills, and the employment and investment of such money and of the paid-up capital of the company in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan and investing in securities, and generally the carrying on of the business of bill brokers and money dealers, as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, at No. 65, *Lombard Street*, in the city of *London*, and with a view to the above objects the acquisition of such business upon terms to be agreed by the directors, and the acquisition, whether by way of purchase or amalgamation or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all acts and things incidental or conducive to the attainment of the above objects."

The articles of association contained the following clause:—

"84. The directors are also authorized to purchase or acquire, upon such terms and under such stipulations as to guarantee or otherwise as may be agreed upon, the business and good will

of the said Messrs. *Overend, Gurney & Co.*, as the same now stands, and any other business of a like character which they may hereafter think it expedient to acquire for the benefit of the company."

On the same day a prospectus of the company was issued, stating amongst other things that the directors of the company were *Henry Edmund Gurney, John Henry Gurney, Robert Birkbeck, Henry Ford Barclay, Thomas A. Gibb, Harry G. Gordon,* and *William Rennie;* and also stating as follows:—

"The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. *Overend, Gurney, & Co.*, of their long established business as bill brokers and money dealers, and of the premises in which the business is conducted; the consideration for the goodwill being £500,000, one-half being paid in cash and the remainder in shares of the company, with £15 per share credited thereon; terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders.

"The business will be handed over to the new company on the 82] *1st of August next; the vendors guaranteeing the company against any loss on the assets and liabilities transferred.

"Three of the members of the present firm have consented to join the board of the new company, in which they will also retain a large pecuniary interest. Two of them (Mr. *Henry Edmund Gurney* and Mr. *Robert Birkbeck*) will also occupy the position of managing directors, and undertake the general conduct of the business.

"The ordinary business of the company will, under this arrangement, be carried on as heretofore, with the advantage of the co-operation of the board of directors, who also propose to retain the valuable services of the existing staff of the present establishment.

"The directors will give their zealous attention to the cultivation of the business of a first class character only, it being their conviction that they will thus most effectually promote the prosperity of the company and the permanent interests of the shareholders.

"Copies of the company's memorandum and articles of as-

sociation, as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company.

"Applications for shares must be accompanied by the payment of a deposit of £2 per share, which will be received by Messrs. *Barclay, Bevan, Tritton, Twells, & Company*, 54, *Lombard Street*. In the event of no allotment being made, the deposit will be returned in full; should a less number of shares be allotted than are applied for, the deposit will, so far as required, be appropriated towards the payment due upon allotment."

At the time when the prospectus was issued no statement of accounts had been prepared; but the liabilities of the firm on the 31st of July, 1865, as stated in a balance sheet entered in the books of the firm, amounted to £15,281,641 17*s.* 10*d.*, including a balance of £1,053,715 1*s.* 3*d.* due to the partners on their private accounts, but not including liabilities in respect of bills rediscounted, bills payable or credits granted, and guarantees. The assets, as stated in the same balance sheet, appeared of equal amount, but included a sum of £4,213,896 16*s.* 4*d.*, under the *head "Suspense and Guarantee Account." This [83 sum was the amount of debts due from the speculative firms and companies already mentioned, in respect of the advances made to them, against which securities of the estimated value of £1,082,000 only were held by the firm. Deducting from the amount of the suspense and guarantee account the balance due to the partners and the estimated value of the securities, the firm appeared on this statement to be insolvent to the extent of £2,078,181 15*s.* 1*d.*; but the partners had private estates valued at £1,257,000, and also an interest in the *Norwich Bank* and the goodwill thereof, valued at £1,067,000, and, taking these into account, they considered that the firm was not only solvent, but that there remained a considerable surplus in favor of the partners, exclusive of the £500,000 agreed to be given for the goodwill of the firm.

The transfer of the business by the firm to the company was carried into effect by two deeds, both dated the 27th of July, 1865. The first of these deeds was that above mentioned in the prospectus, and was made between the *London* partners of the first part, the *Norfolk* partners of the second part, and the limited

company of the third part. It provided for the sale and purchase of the business as a going concern, to take effect at midnight on the 31st of July, 1865, at the price of £500,000 — one half to be paid or allowed on account in cash, and the other half to be paid or treated as paid by the issue of 16,666 shares of £50 each, with £15 paid up; which sum was, so far as the directors of the company might requïre, to be applied and made available by way of material guarantee in aid of the covenants of the parties of the first and second parts therein contained, and the obligation of the company to pay and allow on account; such sum was to be controlled by the right to have the same so applied and made available, and was not to be enforced except in subordination to such right of the company. It also provided that the company should continue and carry on all open or unsettled accounts connected with the business, except such accounts as the directors might require to be reserved or accepted and wound up by the firm as thereinafter provided. It contained a guarantee by the parties of the first and second parts that, irrespective of any value to be attributed to the goodwill of the business, the assets which the company should have
84] *and take the benefit of on the day of completion should produce a net amount of money equal to or exceeding the aggregate amount of moneys which the company might have to pay or provide, or should pay or provide, in satisfaction and discharge of the obligations and liabilities of the firm. It provided that it should be obligatory on some one of the parties of the first and second parts to continue to act under the style of *Overend, Gurney, & Co.*, for the purpose of winding up any outstanding accounts of the firm which the directors of the company should consent or deem it desirable or expedient to be so wound up; and that no property of any description applicable to such accounts should be transferred to the company, but should be retained by the firm, and applied and disposed of by them for the purpose of winding up such accounts. There were provisions for the sale of the business premises of the firm to the company at a price to be ascertained by valuation; and it was stipulated that such price should be made available as and by way of material guarantee for the protection of the company, in the same way as thereinbefore provided with respect to the £500,000.

The second of the deeds was made between the same parties, and had reference mainly to the winding up by the firm of certain accounts specified in the schedule thereto. It provided that a separate account, to be called "*Overend, Gurney, & Co.'s* Suspense and Guarantee Account," should be opened on the day of completion in the books of the limited company, and that such account should be debited with the total amount of the balances which, as struck on the midnight of the 31st of July, 1865, should appear to the debit of the accounts in the schedule; and that such sum should be treated as due to the company from the firm upon an account stated between them and to be liquidated in account current as thereby provided; and the same account was to be credited with £250,000, being one moiety of the price of the goodwill, with the price of the business premises of the firm, and the total balance due to the partners on their private accounts. Then followed provisions as to the mode in which the accounts in the schedule were to be wound up by the firm, and the moneys received by them accounted for to the company. The account was to be closed and balanced on the 31st of December, 1868; if the balance was on the *credit side of the account the amount thereof was to [85 be paid by the company to the members of the firm within a month; if the balance was on the debit side, the amount thereof was to be deemed a debt due to the company, and to be paid by the members of the firm, but at what time was not specified. It was stipulated that the company should have a lien on the 16,666 shares to be issued in payment of a moiety of the value of the goodwill, and on all property retained by the firm to be applied in winding up the said accounts; and such lien was to be for the purpose of securing to the company the performance, observance, and fulfillment of the covenants and obligations contained in either deed on the part of the members of the firm, and for protecting and indemnifying the company against any loss or damage to be sustained by the non-performance or non-observance thereof; and the company were to be entitled to have the said shares and property made available through the medium of a sale or otherwise, in order to secure the performance, observance and fulfilment of such covenants and obligations, and for protecting and indemnifying the company as aforesaid.

The schedule included the following accounts: 1. All accounts between the firm and the *Milwall Iron Works Ship Building Company*, and between the firm and any persons in respect of shares owned by or hypothecated to the firm. 2. All accounts between the firm and any company, firm, partnership, or individual whose affairs were being wound up in bankruptcy, or under the *Companies Act*, 1862, or under any arrangement for the benefit of creditors. 3. All accounts between the firm and any other party in respect of advances, loans, or investments made in or upon the shares, debentures, stock, or property of any company incorporated or unincorporated which had been or was in the course of being dissolved and wound up. 4. All accounts which should be open in the books of the firm in respect of any unrealized property, or securities accepted or taken by the firm in satisfaction or settlement of any account which had theretofore been open or subsisting or unsettled between the firm and any other person or persons whomsoever.

The company commenced business on the 1st of August, 1865. Applications for shares were received very much in ex-
86] cess of the *number of shares to be allotted, and all the shares were duly allotted.

About the 12th of August, 1865, application was made to the committee of the *Stock Exchange* for the appointment of a settling day in the shares of the company. On the occasion of this application the first of the two deeds, dated the 25th of July, was alone produced to the committee, and no mention was made of the existence of the other deed. The application was granted, but, as was deposed by the secretary of the *Stock Exchange*, on the presumption that all deeds relating to the transfer of the business had been produced.

The Plaintiff in this suit received a copy of the prospectus of the company soon after the issue thereof. At that time he had no money in his hands for which he required an immediate investment, and he did not apply for allotment of shares; but he kept the prospectus by him, and subsequently, having received large sums which he wished to invest, he, in October, 1865, purchased in the market 1000 shares in the company at £7 10*s.* premium, and again in December, 1865, purchased in the market a like number of shares at £6 10*s.* premium. The shares

so purchased were transferred to him by deeds dated the 2d of November, 1865, and the 3d of January, 1866.

It appeared in the course of the proceedings in the suit that a very large number, if not the whole, of the shares in question had originally been allotted to *Samuel Gurney*, one of the partners in the firm, and had been by him transferred into the name of his broker, and had been sold by his directions, and that the purchase money had been carried to the credit of the "Suspense and Guarantee Account," in accordance with the provisions of the second deed.

The company stopped payment on the 10th of May, 1866. On the 11th of June following, a resolution was passed that the company should be wound up voluntarily under the supervision of the Court; and on the 22d of that month the usual order for winding up under supervision was made. After considerable litigation, the Plaintiff's name was settled on the list of contributories in respect of the 2000 shares held by him (1), and he had since paid *all calls made in respect thereof. In the course of [87 the winding up all the debts of the company had been paid.

Thomas Augustus Gibb, one of the directors, died in November, 1866.

The bill in this suit was originally filed in 1868, and was afterwards amended; and, as amended, was against *John Henry Gurney*, *Henry Edmund Gurney*, *Robert Birkbeck*, *Henry Ford Barclay*, *Harry George Gordon*, the executors of *Thomas Augustus Gibb*, *Overend, Gurney, & Co., Limited*, and the liquidators thereof, as Defendants. It contained allegations (amongst others) to the effect that no proper investigation was made by the directors into the affairs of the firm; that the balance sheet already mentioned was imperfect and delusive, omitting, as it did, all reference to the liability of the firm on bills rediscounted, bills payable on credits granted, and guarantees, amounting to upwards of £8,000,000, of which a considerable part had ripened into claims; that the estimate of £1,082,000 as the value of the securities for the amount of the suspense and guarantee account was excessive; that the firm was in fact insolvent, and that such insolvency was well known to the partners therein and all the directors of the company; that the second of the two deeds was purposely kept from the knowledge of every one but the direc-

(1) Law Rep., 3 Eq. 576; Ibid., 2 H. L., 325.

tors, in order to conceal the nature of the arrangement between the firm and the company and the state and value of the business; that the guarantees contained in the deed were illusory, inasmuch as the private estates of the members of the firm were wholly inadequate to afford anything like security against the liabilities of the firm, and were in fact insolvent to the knowledge of the directors; that if the Plaintiff had known the close connection between the firm and the *Milwall Iron Works Company* (mentioned in the second of the two deeds), and another company, called the *Atlantic and Royal Mail Steam Packet Company*, to which the firm had advanced large sums, he would not have purchased any shares; that the directors were guilty of a gross neglect of duty in not making an independent investigation into the affairs of the firm, and above all, in not disclosing fully and fairly to the public the information which they actually obtained; that the prospectus was issued for the purpose of falsely and fraudulently misrepresenting the state of the busi-
88] ness *and inducing the public to believe that they would become partners in a profitable business if they became shareholders therein; and that the only object of the promoters of the company was to prevent, if possible, by means of the shareholders' money, the stoppage and ruin of the old firm. It charged that, subject to the claims of the creditors of the company, the Plaintiff was entitled to rescind and avoid the contracts of membership entered into by him and to be indemnified by the Defendants (other than the liquidators) against all sums which he had paid or might be called on to pay to the company or the liquidators thereof.

It prayed for the following declarations: 1. That the statements put forward by the directors of the company in the prospectus and in pursuance of their alleged scheme, were so put forward with a view to deceive and mislead the public, and the Plaintiff as one of the public, and that the same contained several misrepresentations and suppressed several important facts which ought to have been made known to the public, and that the Plaintiff was misled and deceived by such misrepresentations, and induced by them and the omissions of the said important facts to purchase the shares so purchased by him in the company; and that the Plaintiff was therefore entitled to have the sales and purchases of the said shares set aside and rescinded

so far as the same constituted the Plaintiff, or created a contract on his part to become, a shareholder and member of the Defendant company, subject and without prejudice to the rights of the creditors of the said company. 2. That the directors of the company neglected to discharge the duties which they took upon themselves when they assumed to act as purchasers of the said business on behalf of the shareholders in the said company. 3. That the Defendants, *John Henry Gurney*, *Henry Edmund Gurney*, *Robert Birkbeck*, *Henry Ford Barclay*, *William Rennie*, *Harry George Gordon*, and the estate of the said *Thomas Augustus Gibb*, were jointly and severally liable to make good to the Plaintiff or indemnify him against the loss which he had sustained and might sustain in consequence of his having become a member of the Defendant company. 4. That the Plaintiff was entitled to have the equities between himself and the Defendants, *John Henry Gurney*, *Henry Edmund Gurney*, *Robert Birkbeck*, *Henry Ford Barclay*, *William* **Rennie*, *Harry George* [89 *Gordon*, and the estate of *Thomas Augustus Gibb*, adjusted; and that the Defendants, the liquidators, ought not to have made any calls or to make any further calls upon the Plaintiff for the payment of the debts of the Defendant company without having first exhausted, or until they had exhausted, the liability of the said *John Henry Gurney*, *Henry Edmund Gurney*, *Robert Birkbeck*, *Henry Ford Barclay*, *Harry George Gordon*, and *William Rennie*, and the estate of the said *Thomas Augustus Gibb*. 5. That as between the Plaintiff and the Defendants, *John Henry Gurney*, *Henry Edmund Gurney*, *Robert Birkbeck*, *Henry Ford Barclay*, *William Rennie*, *Harry George Gordon*, and the executors of *Thomas Augustus Gibb*, the said Defendants were primarily liable to pay the debts of the creditors of the said company. It then went on to pray for the proper relief, for the purpose of giving due effect to the preceding declarations, or such of them as the Court should think the Plaintiff entitled to, including an injunction to restrain the liquidators from making or enforcing any further calls upon or against the Plaintiff, as a contributory of the Defendant company, until the liability of the directors should have been exhausted in payment of the debts and liabilities of the company; and delivery up and cancellation of the transfer deeds executed by the Plaintiff, and the removal of the name of the Plaintiff from the list of

members and contributories of the company, without prejudice to the Plaintiff's liability to the creditors of the company, in case the remaining contributories of the company should prove to be unable to pay in full the debts of such company.

The Defendants all insisted that the company had been formed in perfect good faith, and not in pursuance of any such fraudulent scheme as alleged in the bill; and they much relied on the facts (which were proved in the cause), that each of the directors had become a shareholder to a considerable amount, and had held his shares to the last; that some of them had induced their near relations to become and continue shareholders; and that others had deposited large sums with the company without taking any security, and that such sums had remained on deposit at the time of the stoppage.

With respect to the alleged fraudulent suppression of the 90] second *deed, it was shown that instructions were given by the solicitor of the company to counsel simply to prepare and settle the necessary deed of transfer; that the preparation of two deeds was the result of a suggestion of counsel to that effect; that Messrs. *Gordon* and *Rennie* required the deeds to be settled by independent counsel on their behalf; that in consequence of the counsel engaged in the preparation of the deeds having other engagements they were able to settle the first of the two only previously to the issue of the prospectus, and that they were unable to settle the other until the 24th of July. They submitted that the preparation of two deeds was a matter with which the directors could not under the circumstances properly interfere. They alleged that the second deed was believed by the directors to be merely part of the machinery by which the guarantee contained in the first deed was to be carried out; and they submitted that they were under these circumstances under no obligation to disclose its existence. They denied that it was concealed or withheld with any fraudulent purpose.

The Defendant, *Henry Ford Barclay*, in addition to the defences set up by the other surviving directors, relied on the fact that he had nothing whatever to do with the preparation or publication of the prospectus. It appeared that in July, 1865, application was made to him to become a director of the company, and that he consented to act as such, but upon condi-

tion that he should not be required to attend to or take part in the formation or promotion of the company, or to perform any duties with reference to the affairs thereof, until his return from a voyage on which he was about to set out. Accordingly he took no part in the formation of the company, but on the evening of the 13th of July he received a bundle of the prospectuses, which had been issued on the previous day with forms of applications for shares, and filled up these forms on behalf of his mother and two of his children. He embarked on his voyage on the following day, and did not return to *England* until the 5th of August, 1870, and it was not until after that date that he entered on his duties as director.

The executors of *Thomas Augustus Gibb*, by their answer, set up, by way of defence, the fact that the injury or wrong complained of by the bill was not committed within six calendar months before *the death of their testator, and they insisted [91 that no action or suit could be maintained against them in respect thereof, and claimed the benefit of the statute 3 & 4 Will. 4, c. 42.

It appeared that Mr. *Peek* never examined the first deed, although it was open to the inspection of the public, nor instituted any investigation into the affairs of the company previously to the failure thereof.

Subsequently to the institution of this suit the surviving directors were indicted, and were tried before the Lord Chief Justice of *England*, in December, 1869. The indictment contained (amongst others) counts framed on the statute 24 & 25 Vict. c. 96, s. 84, which provides as follows: "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor." The Defendants were acquitted (1).

(1) A special report of the proceedings at the trial, including the summing up

Mr. *Kay*, Q.C., Mr. *Swanston*, Q.C., and Mr. *Jolliffe*, for the Plaintiff:—

The duties of persons who issue a prospectus are thus laid down by Vice-Chancellor *Kindersley*, in *New Brunswick and Canada Railway Company* v. *Muggeridge* (1): "Those who issue a prospectus, holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no 92] one fact within their *knowledge the existence of which might in any degree affect the nature, or extent, or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." This passage has since been cited with approbation by Lord *Chelmsford*, in *Central Railway Company of Venezuela* v. *Kisch* (2), and the present Lord Chancellor, in *Henderson* v. *Lacon* (3). We say that the directors did not fulfil these duties; that they, with full knowledge that the firm was insolvent, concealed the fact in the prospectus issued by them; and that, whether such concealment was the result of fraudulent intent or not, they are liable in equity to make good all loss occasioned to persons who dealt on the faith that the prospectus was a document disclosing the whole truth. The evidence in the case is substantially the same as was before the House of Lords in *Oakes* v. *Turquand* (4). Each of the learned Lords who addressed the House, when judgment was given, expressed a strong opinion that the prospectus was not fairly or properly framed; and we submit that your Lordship must arrive at the same conclusion.

The relief we ask, is, first, that the contract between the Plaintiff and the company may be rescinded, subject to the rights of the creditors—a point left open when the case of *Oakes* v. *Turquand* (5) was before the House of Lords; and, secondly, that the Plaintiff be indemnified in respect of the loss he has suffered

of the Lord Chief Justice, has been published by Mr. *W. F. Finlason*, and is hereafter cited as "*Reg.* v. *Gurney*, *Finlason's* Report."

(1) 1 Dr. & Sm. 363, 381.
(2) Law Rep. 2 H. L., 99, 113.
(3) Ibid. 5 Eq., 249, 263.
(4) Law Rep. 2 H. L., 325.
(5) Ibid., 379.

by reason of the improper concealment of the state of the affairs of the firm.

The objection is raised, on behalf of the Defendants, that the Plaintiff's remedy is at law and not in equity. In answer to that we say, first, that there is a concurrent jurisdiction in equity in such cases, even where there is only a single Defendant; secondly, that relief will be given in equity in a case such as the present, in order to avoid multiplicity of actions, for at law we should be compelled to bring a separate action against each director; and, thirdly, that one of the directors in the present case being dead, the legal rule, *actio personalis moritur cum personâ*, prevents our bringing any action against his representatives, and, consequently, we must come for relief into this court.

*In *Evans* v. *Bicknell* (1) Lord *Eldon* says: "It is a very [93 old head of equity, that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false." In *Burrowes* v. *Lock* (2) Sir *W. Grant*, M.R., acting on that *dictum*, decided that a trustee who had received notice of an incumbrance on the interest of his *cestui que trust*, but, having forgotten the fact, represented to a purchaser that the interest was unincumbered, was bound to indemnify the purchaser. That case shows that wilful fraud is no ingredient in the equity of the person who claims indemnity. These cases were followed in the recent case of *Slim* v. *Croucher* (3), decided by the full Court of Appeal. The jurisdiction of the Court was upheld in *Colt* v. *Woolaston* (4): *Green* v. *Barrett* (5); *Cridland* v. *Lord De Mauley* (6); *Ramshire* v. *Bolton* (7); and *Hill* v. *Lane* (8); although in all these cases the objection was raised that the Plaintiff's remedy was at law.

In *Barry* v. *Croskey* (9) which was decided on a demurrer, the present Lord Chancellor makes these observations: I can suppose a bill of this description to be filed against a single Defendant, upon which a Court of Equity, though having indisputably concurrent jurisdiction with a Court of Law, would not think fit to exercise that jurisdiction; but the present bill avers

(1) 6 Ves., 174, 182.
(2) 10 Ves., 470.
(3) 1 D. F. & J., 518.
(4) 2 P. Wms., 154.
(5) 1 Sim., 45.
(6) 1 De G. & Sm., 459.
(7) Law Rep., 8 Eq., 294.
(8) Ibid., 11 Eq., 215.
(9) 2 J. & H., 1, 30.

a combination of several Defendants, against some of whom the Plaintiff may have a direct remedy at law, while against others he may have no remedy at law, or no remedy except by as many separate actions of deceit as there are parties Defendants to the suit. The bill avers, whether truly or not it is impossible at present to say, that the several Defendants have combined to practice jointly this scheme of deceit, one being put forward, but as the agent and for the benefit of the rest. If these averments are true, I apprehend it is a proper case for relief in this Court." Here is a case in which we have no remedy at law against some of the parties, viz., the executors of *Gibb;* and our only remedy against the others is by by bringing separate 94] *actions of deceit; therefore we say, with the Lord Chancellor, that it is a proper case for relief in this Court.

In *Ingram* v. *Thorp* (1) the Plaintiff, to whom representations had been made by a deceased person, was held entitled to have them made good out of his estate. In *Rawlins* v. *Wickham* (2) the like relief was given. That case is as valuable showing that it is not necessary that the representions be fraudulently made. In *Smith* v. *Pococke* (3) it was decided that the *Statute of Limitations* had no application to a case of this description in a Court of Equity.

It may be said, on the other side, that the representation which we seek to have made good was not made to the Plaintiff, inasmuch as he was not an original allottee of shares, but only a purchaser in the market. But in *Bedford* v. *Bagshaw* (4) a person who had bought shares in the market on the faith of false representations made to the committee of the *Stock Exchange*, was held to be entitled to damages. In *Duranty's Case* (5) it was laid down, that a person who had been misled by reports issued by the directors of a company might have a remedy against the directors.

Mr. *Roxburgh*, Q.C., and Mr. *Lindley*, for the Messrs. *Gurney* and *Robert Birkbeck*:—

In the first place, we say that all observations made in the case of *Oakes* v. *Turquand* (6) must be discarded. The present

(1) 7 Hare, 67.
(2) 3 De G. & J., 304.
(3) 2 Drew, 197.
(4) 4 H. & N., 538.
(5) 26 Beav., 268.
(6) Law Rep., 2 H. L., 325.

Defendants had no opportunity of defending themselves in that case, and the evidence in the present case displaces entirely the notion of their having committed any fraud, and establishes that they acted throughout *bonâ fide* and to the best of their judgment. The result of the trial before the Lord Chief Justice shows that. The indictment was framed on the statute 24 & 25 Vict. c. 96; and the issue was, whether the directors issued the prospectus, or conspired to issue it, with the object of defrauding the public. The Lord Chief Justice, in his summing up, clearly showed his opinion to be that there was no foundation for such a charge; the jury agreed with him, and he afterwards disallowed the costs of the *prosecution: *Reg.* v. [95 *Gurney* (1). It has been repeatedly held that there is no difference between legal and equitable fraud, and therefore we are fully entitled to claim the benefit of the decision.

If, then, these directors acted *bonâ fide*, how can the Plaintiff complain? The prospectus refers to the articles of association of the company as open to inspection, and therefore the Plaintiff must be taken to have bought with full knowledge of the provisions therein contained: *Hallows* v. *Fernie* (2). Now the articles provide that the directors may purchase, upon such terms and under such stipulations as to guarantee or otherwise, as may be agreed upon, the business of *Overend, Gurney, & Co.* The directors did purchase the business upon terms which they honestly believed would be remunerative, and under stipulations as to guarantee which they honestly considered would be ample security to the shareholders. In all respects, therefore, they acted within the powers conferred on them by the articles, and the Plaintiff is simply in the position of a principal complaining that his agent has entered into a contract which he was duly authorized to make. This is the very point of the decision of the Lord Chancellor in *Overend, Gurney, & Co.* v. *Gurney* (3), a suit instituted by the liquidators in respect of the matters now complained of by the Plaintiff. It may be said that the bill in that suit did not make a case of fraud; and that is true in this sense, that the strong expressions used in the Plaintiff's bill are not in the liquidator's bill; still, all the facts necessary to

(1) *Finlason's* Report; see p. 255, *et seq.*, and p. 270.

(2) Law Rep., 3 Eq., 520.

(3) Ibid., 4 Ch., 701.

raise the questions were before the Court, and a demurrer to the bill was allowed.

As regards the second deed, we say that it was entirely subsidiary to the first; that the first contained everything essential to the transfer of the business, and the second was merely a piece of machinery, directing the mode in which the excepted accounts mentioned in the first deed were to be liquidated. The same thing might have been done more simply by a resolution of the board of directors, or by a written memorandum, and then the Plaintiff could not have had even the semblance of a ground for complaint, for the directors are under no obligation to make known all their resolutions to their shareholders.

96] *Assuming, however, that the directors did not disclose everything which they ought to have done, we say that the Plaintiff, being a mere transferee of shares, and not an original allottee, has no ground of complaint. Suppose the directors had called a meeting and disclosed everything to the original allottees, could a purchaser from one of them afterwards complain? The office of the prospectus is to invite people to come in originally as shareholders, not to invite them to buy shares in the market. There is no privity whatever between a company and a purchaser in the market. In *Blain* v. *Agar* (1), which was a case in which shareholders sought relief in respect of the fraudulent conduct of directors, it was held that the Plaintiffs might maintain their bill in the character of original purchasers, but not in the character of purchasers from prior purchasers (2). In *Bedford* v. *Bagshaw* (3) the ground of the decision was, that the directors fraudulently procured the appointment of a settling day on the *Stock Exchange*, and that without such appointment the Plaintiff could never have been a purchaser; here no such case is alleged or proved. Moreover, at the highest, the Plaintiff could only claim to be in the same position as the person to whom his shares were originally allotted, viz., Mr. *Samuel Gurney*, one of the partners in the firm, and as such well acquainted with the state of its affairs: *Ffooks* v. *South Western Railway Company* (4).

As to the case of *New Brunswick and Canada Railway Company* v. *Muggeridge* (5), that was a suit for specific performance, and

(1) 2 Sim., 289. (2) Ibid., 296.
(3) 4 H. & N., 538. (4) 1 Sm. & Giff., 142. (5) 1 Dr. & Sm., 363

the suppression of a material fact no doubt constituted a good defence to such a suit; but it has no application to the present case. There is no foundation for the assertion that at common law you must bring as many actions as you have Defendants: *Chitty* on Pleading (1).

Sir *Roundell Palmer*, Q.C., Mr. *Fry*, Q.C., and Mr. *Sayer*, for *Henry Ford Barclay*:—

The plaintiff is clearly not entitled to any relief in the shape of setting aside the transfers to him, or having his name removed *from the list of contributories. He has been [97 settled on the list by the House of Lords, and must remain there for all purposes. There is no such thing as being a contributory by halves — a contributory until the debts are paid, and then being at liberty to rescind the contract. Besides, it is clearly settled, that after a company is wound up a shareholder's contract cannot be set aside: *Clarke* v. *Dickson* (2); *Deposit and General Life Assurance Company* v. *Ayscough* (3); *Mixer's Case* (4); *Western Bank of Scotland* v. *Addie* (5). This would be so if the Plaintiff were an original allottee; but he is not; he is only a purchaser in the market, and if the contract is to be set aside the former owner ought to be here: *Duranty's Case* (6); *Nicol's Case* (7); *Ex Parte Worth* (8). Nor can the Plaintiff have any relief on the ground of negligence. That is not a ground for coming into equity: or, if it be, the Plaintiff should be the company; and, in fact, this question was raised and decided adversely to the company in the suit of *Overend, Gurney, & Co.* v. *Gurney* (9).

There remains only the question, whether the plaintiff is entitled to any relief in the shape of indemnity from the directors. We deny the truth of the proposition, that wherever an action for deceit will lie a bill in equity will also lie. Equity will interfere only in the following cases: first, wherever a contract is to be rescinded; secondly, where fraud, in the proper sense of the word, is to be redressed; thirdly, where a representation has been made which binds the conscience of the party, and estops

(1) Vol. 1, pp. 96, 97.
(2) E. B. & E., 148.
(3) 6 E. & B., 761.
(4) 4 De G. & J., 575.
(5) Law Rep., 1 H. L., Sc., 145
(6) 26 Beav., 268.
(7) 3 De G. & J., 387.
(8) 4 Drew., 529.
(9) Law Rep., 4 Ch., 701.

and obliges him to make it good. In the last case the representation in equity is equivalent to a contract, and very nearly coincides with a warranty at law; and in order that a person may avail himself of relief founded on it he must show that there was such a proximate relation between himself and the person making the representation as to bring them virtually into the position of parties contracting with each other.

In *Rawlins* v. *Wickham* (1) the object of the suit was rescission 98] *of a contract; it falls, therefore, under the first of the three classes, and is inapplicable as an authority here. Like observations apply to the cases of *Green* v. *Barrett* (2), *Cridland* v. *Lord De Mauley* (3) and *Colt* v. *Woollaston* (4), although into all of them fraud may have entered in a greater or less degree.

As to the cases which rest upon fraud (and the case of the Plaintiff as put by the bill is one of fraud), it is necessary to prove the *scienter* in equity just as much as at law: *Henderson* v. *Lacon* (5); *Ship* v. *Crosskill* (6); *Pike* v. *Vigers* (7); *Attwood* v. *Small* (8); and *New Brunswick and Canada Railway Company* v. *Conybeare* (9).

The third class of cases is illustrated by *Evans* v. *Bicknell* (10); *Burrowes* v. *Lock* (11); *Slim* v. *Croucher* (12); and *Ingram* v. *Thorp* (13). In all of these cases there was a representation made with a view to a particular contract. How can that be said to be so here? The object of the prospectus was to induce persons to become applicants for shares to be allotted to them, and after the allotment was made it was *functus officio*. A person purchasing shares on that prospectus is applying the representations made for one purpose to a wholly different transaction; and, whether or not he can maintain an action, he has no ground for seeking relief in equity: *Burnes* v. *Pennell* (14). This view has been adopted with reference to the very question now under discussion by Vice-Chancellor *Shadwell*, in *Blain* v. *Agar* (15),

(1) 3 De G. & J., 304.
(2) 1 Sim., 45.
(3) 1 De G. & Sm., 459.
(4) 2 P. Wms., 154.
(5) Law Rep., 5 Eq., 249.
(6) Ibid., 10 Eq., 73.
(7) 2 D. & Wal., 1, 252.
(8) 6 Cl. & F., 232.
(9) 9 H. L. C., 711.
(10) 6 Ves., 174.
(11) 10 Ves., 470.
(12) 1 D. F. & J., 518.
(13) 7 Hare, 67.
(14) 2 H. L. C., 497.
(15) 2 Sim., 289.

and by Lord Justice *Turner* in *Nicol's Case* (1), and *Barrett's Case* (2).

Clifford v. *Brooke* (3) and *Ogilvie* v. *Currie* (4) show that without proof of actual fraud you cannot bring into this Court a transaction which is properly the subject of an action at law.

If a representation has been innocently made by an agent, and it turns out to be incorrect, the agent is not liable: *Cornfoot* v. *Fowke* (5); *National Exchange Company of Glasgow* v. *Drew* (6); and *Udell* v. *Atherton* (7). [99

We submit therefore that, fraud in this case being disproved, the Plaintiff has no title to relief in this Court against any of the Defendants, and certainly not against Mr. *Barclay*, who took no part in issuing the prospectus.

Mr. *Fooks*, Q.C., and Mr. *W. Fooks*, for *Harry George Gordon*:—

The case made by the bill is one of fraudulent misrepresentation or concealment. In order to establish such a case fraudulent intent and motive *mens rea*, must be proved. A false representation does not give rise to an action for deceit unless it is fraudulently made: *Taylor* v. *Ashton* (8); *Scott* v. *Dickson* (9); and *Western Bank of Scotland* v. *Addie* (10). The same rule applies in equity: *Heymann* v. *European Central Railway Company* (11); *Pulsfold* v. *Richards* (12); and *Adamson* v. *Evitt* (13). Moreover, the representation complained of must be of fact, not a mere expression of opinion or belief: *Haycraft* v. *Creasy* (14); *Evans* v. *Collins* (15). Again, the damage must be a proximate, not a remote, consequence of the acts complained of: *Collis* v. *Selden* (16).

Therefore, in order to succeed, the Plaintiff must show, first, that the statements in the prospectus were knowingly false and intended to deceive; secondly, that he was within the class of persons intended to be deceived; thirdly, that he was deceived by the statements in question; fourthly, that the loss he has suffered was the immediate consequence of the misrepresentation.

(1) 3 De G. & J., 387, 439.
(2) 3 D. J. & S., 30.
(3) 13 Ves., 131.
(4) 37 L. J. (Ch.), 541.
(5) 6 M. & W., 358.
(6) 2 Macq., 103.
(7) 7 H. & N.. 172.
(8) 11 M. & W., 401; 12 L. J. (Ex), 363.
(9) 29 L. J. (Ex.) 62, n.
(10) Law Rep. 1 H. L., Sc., 145.
(11) Ibid., 7 Eq., 154.
(12) 17 Beav., 87.
(13) 2 Russ. & My., 66.
(14) 2 East, 92.
(15) 5 Q. B., 804.
(16) Law Rep., 3 C. P., 495.

Upon the evidence we say that he has not succeeded in establishing any one of these propositions.

Mr. *Jessel*, Q.C., Mr. *Macnaghten*, and Mr. *Medd*, for *William Rennie* :—

Although it has been laid down that fraudulent concealment
100] is *equivalent to fraudulent misrepresentation, no one has ever said that non-disclosure, without fraud, is equivalent to untrue statement without fraud.

Moreover, it is not competent to the Plaintiff to seek relief against the Defendants on the ground of non-disclosure without fraud. His bill is founded on allegations of fraud, and that being so, he cannot pick out facts which, if properly alleged in the bill, might create an independent equity: *Hickson* v. *Lombard* (1).

Again, on what principle is the amount of relief to be given to the Plaintiff to be ascertained? He is only a transferee: he bought at seven premium; but suppose he had bought at seven discount: then he could not have compelled the Defendants to pay the full amount he had lost.

Sir *R. Baggallay*, Q.C., Mr. *Macnaghten*, and Mr. *Maclean* for the executors of *T. A. Gibb* :—

We rely on the statute 3 & 4 Will. 4, c. 42, s. 2. It is true that the enactment in terms refers only to actions at law; but wherever there is concurrent jurisdiction Courts of Equity (in the absence of any special circumstances entitling the Plaintiff to equitable relief), adopt, by analogy, the rules adopted in Courts of Law: *Lansdowne* v. *Lansdowne* (2), and *Bishop of Winchester* v. *Knight* (3). In suits of this description there is no remedy in equity, except where there has been profit to the wrongdoer; *Powell* v, *Aiken* (4); or a breach of trust: *Walsham* v. *Stainton* (5). In *Rawlins* v. *Wickham* (6), so much relied on by the Plaintiffs, the issue was, not whether the representations of a deceased person were to be made good out of his estate, but whether a contract he had entered into was to be rescinded; and rescission was decreed.

(1) Law Rep., 1 H. L., 324.
(2) 1 Madd, 116.
(3) 1 P. Wms., 406.
(4) 4 K. & J., 343, 358.
(5) 1 H. & M., 322; 1 D. J. & S., 678.
(6) 3 De G. & J., 304.

Mr. *Ferrers*, for the company and the liquidators.

Mr. *Kay*, in reply:—

The result of the indictment cannot in any way affect this case. The Lord Chief Justice, throughout his summing up, carefully *distinguishes between liability in a civil and [101 in a criminal court: *Reg.* v. *Gurney* (1).

It is not necessary in all cases of fraud to prove the *scienter*, even at law. In *Taylor* v. *Ashton* (2), Baron *Parke* expresses his assent to the proposition that in order to constitute fraud it is not necessary to show that the Defendants knew the fact they stated to be untrue; that it is enough that the fact is untrue if they communicated it for a deceitful purpose. In order to support an action for deceit, "it is only necessary to show that what the Defendant asserted was false within his own knowledge, or asserted recklessly, without any knowledge on the subject" (3). That was laid down in *Moore* v. *Burke* (4). That case also lays down, that although, a prospectus be not the influencing motive to take shares, but a material one, the Plaintiff is entitled to recover. The same thing was laid down in *Clarke* v. *Dickson* (5). and in *Reynell* v. *Sprye* (6).

Nov. 6. Lord Romilly, M.R.:—

This suit is instituted by Mr. *Peek*, praying, in substance, that the Defendants, the late directors of the limited company of *Overend, Gurney, & Co.*, and also that the executors of Mr. *Gibb*, a deceased director, out of his estate, may be made jointly and severally liable to indemnify and make good to the Plaintiff the losses he has sustained by reason of his having purchased 2000 shares in this company, in consequence, as he alleges, of the prospectus put forth by the directors, which intentionally suppressed facts of vital importance which, if disclosed, would have prevented him from making any such purchase.

The case, as regards the surviving directors and as regards the estate of the deceased director, is, though in many respects

(1) Fin. Rep. pp. 215, 250, 251, 266.
(2) 11 M. & W., 401; 12 L. J. (Ex.), 363.
(3) 1 Sm. L. C., 6th Ed., p. 168.
(4) 4 F. & F., 258.
(5) 6 C. B. (N. S.), 453.
(6) 1 D. M. & G., 660.

the same, so far distinguishable, that I think it convenient to consider first the case of the surviving directors, and afterwards examine how far these considerations affect the estate of the deceased director.

102] *The case made by the Plaintiff against the directors is the publication of a prospectus knowingly and wilfully incorrect and deceptive; that this incorrectness and deception were not produced by any untrue statement, but by the suppression of a material and important fact. I have therefore to consider whether any fact was concealed, whether it was material, and whether it was known to the directors who issued the prospectus.

In order to explain and fully understand the fact said to be concealed, it is necessary to recur shortly to the formation of this company, and the circumstances and motives which led to it.

The firm of *Overend, Gurney, & Co.* was, in the year 1856, and had been long previously to that period, widely known as a great bill-broking and money-lending firm, of great wealth and influence, and enjoying the highest reputation in the *City of London.* In 1856 *Samuel Gurney* the elder, to whose skill and judgment the position and celebrity of the firm were principally due, died. In 1857 some reverses occurrred, and *David Barclay Chapman*, one of the then partners of the concern, retired from the firm. At this time the business and the partners stood in this position:—The *London* bill-broking house was, and always had been, intimately connected with the *Norwich* banking firm of the same name. The *London* firm consisted of four partners; it took three-fourths of the profits made by the *London* firm, and it paid one-fourth of them to the *Norwich Bank.* The *London* firm took no part of the profits of the *Norwich Bank.* Two persons, and two only—*Samuel Gurney* the younger, and *Henry Edmund Gurney*—were partners in both firms. The remaining partners in the *London* firm were *David Ward Chapman* and *Robert Birkbeck.* The *Norwich* firm consisted of seven partners, namely, *Daniel Gurney*, *John Henry Gurney*, *Francis Hay Gurney*, *Henry Birkbeck* and *William Birkbeck*, added to the two members of the *London* firm already mentioned.

Subsequently to this period, namely, the year 1856, the affairs of the *London* firm appear to have been carried on in a very dif-

ferent manner from what they had been during the time of *Samuel Gurney* the elder. Money was advanced on insufficient security, and to assist in hazardous speculations. In 1861, *John Henry Gurney*, who was one of the partners in the *Norwich* firm, and not otherwise than as such interested in the *London* firm, came to **London* and attended especially to the business [103 of the *London* firm, which seems to have been carried on almost exclusively under his direction. The business, however, did not improve; the losses continued, the imprudent speculations did not cease; and the consequence of all this was, that in the early part of the year 1865 it became obvious to the partners that they could not go on as they had done, and that some very considerable change must occur, or that both the firms would be compelled to be wound up. Accordingly, in the month of April or May, 1865, Mr. *John Henry Gurney*, Mr. *H. E. Gurney*, and Mr. *Jones*, the solicitor of the firm, met together, and proposed the formation of a company, and the consequent accession of new funds, for the purpose of reinstating the firms.

At this time it is, in my opinion, judging from the evidence before me, clear, that if the firm had attempted to go on without assistance they must have speedily stopped, and that if they had stopped they would have paid but a very small dividend. I say this, judging from the experience (which is large) which the Court has in such matters, and still more so from the evidence of the results appearing in this cause.

In giving the account of the state of this concern which I do here, I shall not refer in detail to those parts of the evidence which appear to me to establish the facts on which I rely, but I shall merely state the results which appear to me to flow necessarily from the evidence laid before me. The *Norwich* firm, it is true, was not implicated in the speculations assisted and fostered by the *London* firm; but the two firms were intimately connected together, both because the *Norwich Bank* was a sharer in the profits of the *London* firm, and because two of its partners were partners in both firms; and I think it clear that no stoppage of the *London* house could have failed to bring with it the downfall of the *Norwich* house. The state of the concern, as it appears in this cause, was most alarming. As I judge from the evidence, the result was that the liabilities of the *London* firm, totally independent of its ordinary and regular busi-

ness, which it has been pleased in this case to call its legitimate business, were in round numbers four millions sterling. Its assets to meet these liabilities were one million. The balance of 104] loss would be three millions—the exact figures, I *think, were £3,117,000—and the estimated produce of the whole of the assets was £1,080,000. The firm might be called upon at any time to meet the liabilities; the assets could not be realized without the lapse of much time and the bestowal of much care, and the only fund to meet the excess was to be found in the private resources of the partners. Nevertheless, the members of the firm did not consider, as they now say and contend, that this was a state of insolvency. They endeavor to make out their case in this manner; of course the private fortunes of the partners were assets to pay the debts of the firm, and these might fairly be estimated at £1,257,000. The amount to be obtained from the *Norwich* firm was set down at £767,000; and the goodwill of the *Norwich* firm was put at £300,000, making together £1,067,000; and with the private estates of the partners this would amount to £2,320,000, in addition to which they added the goodwill of the *London* firm at half a million. But even with every mode of putting down the assets in the most favorable manner to them, I cannot make out that a smaller deficit than £500,000 would have occurred if everything could have been realized at once and as favorably as they expected; for it must be borne in mind that in the case of a stoppage the goodwill of a firm vanishes, and also that the compulsory realization of assets, as we learn by daily experience, takes a heavy percentage away from their value.

In this state of things I have carefully considered the matter, and I have canvassed the evidence and the figures which are not in dispute in every way I can; and regarding it most favorably for the partners, I think it clear that in April and May, 1865, the old firm was hopelessly insolvent, and that this circumstance was known to all the members of both firms. I also am of opinion that the project of forming a joint-stock company to carry on the business of the *London* firm was for the purpose of maintaining, or what is vulgarly called "bolstering up," that firm. Thereupon, with this view, they applied to and obtained the consent of four gentlemen of great means and high reputation in the city of *London* to concur with them in forming

the joint-stock company of *Overend, Gurney, & Co.* These gentlemen were the Defendants *Henry Ford Barclay*, *Harry George Gordon*, *William Rennie*, and a gentleman, who has died pending this suit, named *Thomas Augustus Gibb*, and *whose executors are now defendants to this bill. Better asso- [105 ciates could not possibly have been obtained. They were all gentlemen of great commercial experience and high reputation in the city of *London* for practical, businesslike habits, and were also all wealthy men. To these gentlemen the partners in *Overend, Gurney, & Co.*, frankly and openly explained their condition, the state of their firm, and laid open to them all their accounts; and, with this knowledge before them, they all consented to join in forming the new company of *Overend, Gurney, & Co.* They were well aware, as they must have been, that in the state of the commercial world at that time the shares in the new company would be eagerly sought for, and that no difficulty would be found in filling the list of shareholders. Accordingly, on the 12th of July, 1865, they issued a prospectus for the formation of a limited joint-stock company for the purchase of the business of the old firm at the price of £500,000, of which one-half was to be paid in money and the other half in shares, on which £15 per share was to be credited as paid up. The capital of the company was to consist of 100,000 shares of £50 each, on which £15 per share was intended to be called up. With a million and a half sterling to be thus obtained, they did not doubt the power of the company to tide over the then existing difficulties of the old firm, and to lay the foundation of a new and thriving concern, carrying on and confining its business to what was called the legitimate business of the old house of *Overend, Gurney & Co.* Now, in doing this, I am convinced that they all acted *bonâ fide*, with their eyes open. It was done to protect and preserve that most valuable asset, the reputation and goodwill of the old business, the value of which they estimated, and perhaps justly, at £500,000, but which goodwill would become zero if the old firm were stopped.

Nothing, I think, shows more clearly what was passing in the minds of all the directors than the following passage in the answer of *Henry Ford Barclay*: "From my connection with the families of the *Gurneys* and *Birkbecks*, I knew that the business

carried on by them under the style of *Overend, Gurney, & Co.*, had for many years been extremely lucrative and profitable, that the said firm were in first-rate credit, and that the various members of the said firm were possessed of great wealth; and
106] until the month of May, *1865, I had no reason to believe, and did not believe, that the business carried on by the said firm had been otherwise than uniformly profitable. Some time towards the end of that month, my wife's sister, *Elizabeth de Bunsen*, who was then staying at my house, spoke to me concerning the affairs of the said firm. She then informed me that it was considered advisable, owing to heavy losses which had been sustained by the said firm, to take steps for the introduction of fresh capital into the said business. This was the first intimation to me that the said firm had not been always most prosperous and successful. The said *Elizabeth de Bunsen* asked me to see her brother, the Defendant *Henry Edmund Gurney*, and to endeavor to settle with him some plan by which the private funds of some of the members of the family might be applied in the purchase of the business or the reconstruction of the said firm. She also then stated to me that she believed that several members of the family not then actually connected with the said firm would be ready and willing to join in any suitable plan which might be devised, and to contribute funds for the purpose of carrying such plan into effect. Accordingly, I shortly afterwards had an interview with the Defendant *Henry Edmund Gurney*, at the *Fenchurch Street* railway station, when we discussed the matter shortly, and I perfectly recollect that he then incidentally stated to me that the said firm could pay all claims, and were in fact perfectly solvent. A few days afterwards I had another very brief interview with the Defendant *Henry Edmund Gurney*, in *Lombard Street*, when he informed me that there was an amount of £4,000,000 locked up in securities, which were not immediately convertible, and he also stated that there was capital of about £1,000,000 standing to the credit of the partners. I gathered from the conversation of the Defendant *Henry Edmund Gurney* that he considered that if £500,000, or thereabouts, of additional capital could be contributed by various members of the family not connected with the said firm, such a sum would be sufficient for the requirements of the said firm, and that the business and profits of the said

firm were large enough to employ such additional capital most profitably. I thought that I and some others connected with the *Gurneys* could contribute from £400,000 to £500,000; but, having regard to the magnitude of the business, and especially of *the amount of the deposits, which I was in- [107 formed then amounted to no less than £14,000,000, I did not agree with the view expressed by the Defendant *Henry Edmund Gurney* that such a sum would prove sufficient. At the Defendant *Henry Edmund Gurney's* request, on leaving him, I called on and had an interview with the Defendant *William Rennie*, and very shortly discussed the same matter with him. To the best of my recollection he agreed with me, that from the enormous business in which the said firm were engaged, and the immense sums with which they were in the habit of dealing, the whole matter was too large to be undertaken by any private means which we could command."

I select this passage, not that it is evidence against the other Defendants, but because it appears to me to express very clearly what the rest of the evidence establishes to have been present in the minds of all the Defendants, namely, that the leading object of the formation of the new company was to prop up the old firm, and, to use the words I have read, that the matter (that is, the support of the existing concern) was too large to be undertaken by any private means which they (that is the partners), or their families could command. It was to supply this deficiency, which the partners and their families could not command money enough to meet, and in the expectation that the million to be obtained from the new joint-stock company would be sufficient to restore and retrieve the firm, that the scheme was entertained and the company established. This fact, the real object of the formation of the company, was wholly concealed from the public; but the fact was perfectly well known to all the persons who joined to form the company, and this is admitted by them all.

Then comes this question: was it honestly concealed from the public? By the word "honestly" I mean this: were the directors, in forming this company, aware that it was essential for the accomplishment of their object, that is, the formation of this joint-stock company, that the state of the old firm should not be divulged? In other words, was it essential that the fact,

to put it no higher than Mr. *Henry Ford Barclay* puts it, that if the firm had been then wound up it would have required all the private estates of the partners to enable them to meet their liabilities — was it essential that this circumstance should not be 108] divulged, and did *they conceal it accordingly? It is necessary, therefore, in the first place, in order to arrive at a correct answer to this question, to examine minutely in what respect this fact was material; and I think that the word "material" here means, whether the publication of this fact would have prevented the formation of the company. Then it must be ascertained whether the directors were cognizant that this would have been the result of publishing this fact. As to the first, I am of opinion that the fact was most material; and the evidence in this case, in my opinion, proves it, if there could indeed, have been any doubt upon the matter, or the necessity of any evidence to prove it. What first began to shake the stability of the concern? The evidence shows that it was a report, too well founded, that the partners were selling their private estates in order to meet the liabilities of the old firm. But even this is not required. It is only necessary to open our eyes and examine what occurs daily among the merchants and men of business in the city of *London* to see that ths slightest inkling of a doubt as to the stability of the old firm would instantly have occasioned a most searching investigation by the most able and competent persons into, and a complete disclosure of the state of the old firm. I do not entertain the slightest doubt that if it had become generally known, when the prospectus was issued, that the liabilities of the old firm exceeded £3,000,000, and that to meet this amount of liabilities the firm had no assets that were not already engaged to meet the current liabilities — that they had in fact nothing with which to meet it but the private fortunes of the old partners and the goodwill of the business — if this had been known, I say, I do not doubt that few, if any, shares would have been taken in the new company; and in so stating the case I am, in my opinion, considerably understating the position in which the business stood, and I am wholly omitting a most material element in all such cases, namely the impossibility of rapidly realizing securities, and the equal impossibility of preventing creditors from rapidly enforcing their claims. What I have now stated

is, in my opinion, shown by the whole course of those events which have accompanied the formation of this disastrous company. The facts of this case prove how material the formation of the company was for the maintenance of the old firm; for not only could not the old firm have gone on without assistance, *but even the million subscribed by the public was [109 not sufficient to enable them to do so, though confined to the legitimate business, as it is called. The concern was dragged down by the dead weight of the liabilities of the old firm, for which the new company was not liable. I am of opinion, therefore, that this fact, namely, the state of the old firm, was a most material fact.

The second question is this: Did the directors know this? I do not entertain the slightest doubt that they all perfectly well knew it, and knew well, that if the company was to be formed at all this fact must not be told. It is to be remembered that these were all gentlemen well versed in commercial concerns, and perfectly cognizant of all the phases which they take, and upon what slight matters the credit of a business may depend, and how slight a matter will shake it and test its stability to the utmost. I believe that they would not have hesitated in expressing an affirmative opinion as to the materiality of the knowledge of this fact in any similar case in which they were not personally concerned. But then arises the observation so strongly put forward on their behalf—If they thought so, why did they embark in the concern? Why did they advance large sums of money in a concern which, as the event shows, was sure to come to ruin, and to involve them in a great pecuniary loss; and why did they stick to the concern to the last? The answer is, that they were embarking personally in a great speculation which they believed would turn out well, and which, if it did, would produce a large amount of profit to them; that it was a question of probabilities, and that they had calculated the chances with great care, and had convinced themselves that they should win. But, as in many other cases of similar speculation, they miscalculated the chances; they did not take into account the events which might and which did arise. They did not foresee, they did not allow for, the crisis and the general panic which were about to arise. They knew, as Mr. *Henry Ford Barclay* says in the passage which I have read, that the

firm could not go on with the means of the existing partners; but they honestly, that is they truly and firmly believed, that with one million, or one million and a half, to be levied from the public, they would be able wholly to reinstate the affairs of the concern, and that, when once the difficulty was tided over, 110] the great and *lucrative business, what is called the legitimate business, of *Overend, Gurney, & Co.*, would produce great profits to all the members of the company.

But then comes this question: Were they justified in inducing the public to join with them in a speculation which they honestly believed would turn out successful, without giving the public all the information they themselves possessed about the matter? This raises the great and important question, which arises in a Court of Equity, but which did not, and could not, arise in a Criminal Court, namely: Does this honest and sincere belief in the probable success of a company exonerate the directors who form it from the consequences of the concealment of an important fact on which it is highly probable that the success of the scheme may depend? Does it justify such directors in retaining in their own breasts all knowledge of this fact? It does exonerate them from any liability in a Criminal Court; does it do so in a Court of Equity? I think not. Does the innocent concealment of a most material fact by a man who by so doing has induced another to embark in a concern which is equally injurious to both, and which the other man would not have embarked in if he had known the whole truth, exonerate the man who has concealed it? It is proper, however, that I should guard against a misconstruction, or rather misconception, of my meaning in using the word "innocent." I mean merely that the concealment, however culpable, does not amount to a crime. There is, as I shall presently have occasion to observe, every species of gradation of culpability in these matters. In the case of a concealment of a most material fact, does the belief of the concealer that such concealment will be beneficial to himself and to the man whom he induced thereby to join with him in the speculation, exonerate him from the consequences? I think not.

It is to be observed also, in my judgment, that the fact concealed was of such moment that upon its being known or not depended the whole scheme; that the formation of the com-

pany was impossible if it had been known. It appears to me, nor do I entertain any doubt on the matter, that when the directors met together they assumed, as a matter of course, that the then state of the firm was not to be divulged; not that any one proposed its concealment, and that another assented to any such proposition, but that it *was treated by common con- [111
sent as a matter of course. If it had been suggested it would have been stopped at once, as, if done, fatal to the whole scheme. They considered that the public must judge for themselves in these matters, and that, if not required, it was not for them to volunteer information. They might have said, the formation of such companies is common but such investigation is rarely required, and here certainly it was never even asked for. It is very possible that in ordinary cases this may be true; but in a vast concern, known to be carrying on a large and lucrative business, and where the partners were all men of large property, the insolvency of such a firm, coupled with the doubt whether, even with the assistance of the whole of the private fortunes of all the partners, the liabilities could be met, and the certainty that they could not if rapidly enforced — in such a case the insolvency of the firm about to be converted into a joint stock company ceased to be an ordinary circumstance.

I am of opinion, therefore, that, even if, so far as the extent of the business of the old firm was concerned, such an excuse or defence could be correct, and conceding that, if there had been no exceptional matters in the case of the liabilities and the assets belonging to it, the concealment of the state of the concern would not have been material — even if this be conceded, which concession I should not be disposed to make without qualification — still, in a case where the liabilities exceeded the assets and the securities by three millions, and this deficiency could be met only by the private estates of the partners and the value of the goodwill, that is, the reputation of the old firm, then the fact becomes of far greater importance, and assumes a far graver aspect. When the unexpected calamity happens, a director cannot be allowed to say, "I knew the fact well, but I did not consider it of any moment." The Court must judge for itself whether it was of moment or not, and will impute to each director that knowledge which, if he did not possess, he ought to have possessed, and will visit him with the consequences naturally

flowing from it. This, in my opinion, is a familiar doctrine of equity. It would be easy to illustrate it by many instances, but I will only take one. Suppose the assignee for value of a patent were to found a joint stock company for the purpose of 112] working the invention, which was one of great value, *and that he was aware that the original inventor and patentee contested the validity of the sale to the person from whom the assignee and founder had bought it, or that some stranger was contesting the validity of the patent itself; but that having examined into the matter, the founder of the company had convinced himself that the sale was a good one, and that neither the original patentee nor the stranger would be able to disturb the sale or the patent: in such a case, would the founder of the company be justified in concealing this fact from the persons applying for shares, and could he afterwards keep the allottees to their bargain when it appeared that the patentee was instituting proceedings to set the whole aside; and could he be allowed to say, "I looked into the matter carefully, and satisfied myself that the original patentee or the stranger about to contest the validity must fail?" Still less could he do so after the original patentee or after the stranger had succeeded, and the subject-matter of the patent had become of no value; nor would it be any excuse in a Court of Equity that the person so founding the company honestly believed what he said, and had embarked all his own property in the speculation.

Here I cannot but make one observation on what appears to me the extremely ill-advised prosecution of the directors for a criminal offence — an offence of which I venture to think no rational man could ever have found that they were guilty. No doubt they did not intentionally try to induce persons to put money into a concern which they knew or believed would fail. They firmly believed that it would all turn out well for themselves and for the others; but this is no excuse in equity, which requires, to sustain such transactions, not that there should be merely an absence of any intention or even of any motive to deceive, but that the truth should be told, and that not partially, but that the whole truth should be told. And the man who induces another to enter into a contract without telling him the whole truth relative to the subject-matter of the contract, cannot afterwards compel that person to perform the contract entered

into in such ignorance, or escape from the necessity of making good to him the injury he has inflicted upon him. Accordingly I am of opinion that the trial at *Guildhall* before the Lord Chief Justice, admirable as his summing *up was and in every [113 way correct as the verdict of the jury was, has nothing whatever to do with this case, and that if it were allowed in any respect to influence my judgment in this case, it would, in my opinion, be tending to sap the foundations of the highest principles on which the doctrine of equity depends, the doctrine of which may be expressed in the words under the sanction of which witnesses give evidence, and which requires the truth, the whole truth, and nothing but the truth to be told.

A more dangerous doctrine could scarcely be laid down than that, unless a fraud is of so deep a dye of mortal turpitude that it amounts to a crime and is punishable in a Court of criminal jurisdiction, the Court of Equity has no power to entertain the consideration of it, or to compel the author of it to rectify the calamities he has thereby produced. The distinction between the case of equitable and criminal jurisdiction in matters of fraud is laid down in many cases, but I think it is well put in *Burnes* v. *Pennell* (1). It is the *suppressio veri* or the *suggestio falsi* which is the foundation of the right to relief in equity, and this exists whether it were fraudulently or mistakenly done. It is the superadded guilty intention which gives the criminal jurisdiction, but which does not take away the equitable jurisdiction. A man may not have intended to deceive, and may have believed that he did not, when he was really suppressing the truth or suggesting what was false. If so, he is not liable to an indictment in a criminal Court, but he is equally responsible in equity as if he had, while committing these acts, done so with a view to injure others or to benefit himself.

Burrowes v. *Lock* (2) and many other cases establish that distinction. No doubt the trustees in that case could not have been made guilty in a criminal Court, and had it not been for the ill-considered prosecution in this case I should not have expected to have heard this doctrine questioned.

In stating the proposition,I have said that the absence of any intention and of any motive to deceive would not, in equityl support a contract founded on the suppression of a materia,

(1) 2 H. L. C., 497. (2) 10 Ves., 470.

fact, or relieve the concealer from the consequences of so doing; but I am by no means of opinion that the present case can be put so high in favor of the Defendants. The real state of the 114] case I believe to be *this: they wished to form this company; they believed sincerely and honestly, after investigation, that it would turn out profitably for themselves and the other shareholders, and, come what might, they intended to stick by the company; but they knew that any disclosure of the circumstances of the old firm would render it impossible to form the company, and accordingly it was a *sine quâ non* that these should not be divulged. I do not think that anything turns on the fact of two deeds instead of one; the material consideration is, that it was necessary that nothing should lead any one to ascertain and publish the condition of the old firm, which, if done, would have rendered the whole scheme impracticable; and this was, in my opinion, not only true, but it was the truth well known to every one of them, and the concealment runs through the whole transaction. It is true that Mr. *H. F. Barclay* says in his answer that he expected "that the company to be formed for this purpose would be honestly and rightly" brought before the public by the promoters, of whom he says he was not one. On considering his answer, however, I am not of that opinion. But it is not material; for most certainly he was one of the first directors, and most constant in his attendance, and it was his duty to see that this honest disclosure had been made, which, in my opinion, it had not. I have no doubt they all thought alike in the matter, but this expectation and intention so spoken of by him did not include the communication of the state of affairs of the old firm. If such a communication had been made there would have been an immediate stoppage of both the old firms, and a meeting of the creditors of both would have been called; but the panacea adopted in ignorance of the truth, that a new joint stock company should be established, would not, as I believe, have been possible. In truth the case stands shortly thus: to disclose the state of the firm was bankruptcy to the partners; to conceal it was the establishment of a new, and probably a thriving, joint stock company. I find myself unable to make any distinction in this matter between Mr. *Henry Ford Barclay* and the rest of the directors. It is clear that they all acted together; that they all approved of the prospectus, if not

before it was issued, immediately after it was issued; and Mr. *Henry Ford Barclay*, who had been previously consulted and induced to join, on his return, *found no fault with it, [115 nor proposed any alteration or fresh communication to be made to the public.

The prospectus itself is a model for such a purpose. The first sentence I believe to be strictly true, when the directors said that, in their opinion, it would insure a highly remunerative return to the shareholders; but the shareholders had not the means afforded to them of forming an independent judgment on that subject. The second paragraph it was not in the power of the members of the old firm to perform. The state of the existing liabilities and assets of the old firm made it impossible for their guarantee to be worth anything, and this by reason of the insolvent state of that firm; but no allusion is made to the amount of the claims against the old firm, all of which would have, as I now understand it, to be made at the office of the new company, and to be there paid out of the general assets of both the old firm and the new company, subject to the subsequent apportionment of them between the members of the old firm and the shareholders of the new company. It is not as if the creditors of the old firm, or any selected number of them whose liabilities were not taken up by the new company, would have had to present their claims at a different office, and to be paid in a different place; but, so far as the public were concerned, they seem to be treated as all alike, without any distinction. Accordingly I, after some time, became aware of the utter inutility of what I at first was anxious to obtain, namely, a correct list of all the liabilities repudiated by the new company. I had at one time imagined that a creditor of the old firm, whose liability had not been adopted by the new company, would, on presenting his bill or making his demand, have been informed that he must go elsewhere to be paid, and that the only persons liable to pay him were the members of the old firm, and not the assets of the new company of *Overend, Gurney, & Co.*, who repudiated the transaction. This, of course, as I saw clearly upon a fuller examination of the matter as the case proceeded, was impossible. The new company were obliged to pay all the debts, whether of the old firm or the new company, whether adopted by them or not; and had they not done so,

an immediate bankruptcy of the old firm and an overpowering run on the new company would forthwith have taken place. All that the new company of *Overend, Gurney, & Co.*, could 116] do was to require *the members of the old firm to supply them with money to meet these claims. The result was that which might naturally have been expected; they sold their estates to supply the necessary funds, and even by so doing the members of the old firm were not able to supply the new company with money sufficient to meet the demands made upon them, and repay the advances made by the new company for liquidating these claims. In the meantime the sale of the private estates and the realization of the private property of the old partners startled and alarmed the public, the shares began to fall, the claims began to multiply, and the assets failed. The *Bank of England* was applied to for assistance, and very wisely refused to make any advances; and the company stopped payment, and has had to be wound up in chancery.

After the occurrence of these events it seems quite simple that all this should have happened; and it seems quite strange that it should not have been foreseen by the gentlemen who joined or who established the concern as directors; but in truth they were all carried away by their sanguine expectations of the profits to be ultimately realized, and thereby involved themselves, and many others who were ignorant of the previous state of the concern, in great and heavy losses. But this mistake on the part of the directors does not, in my opinion, exonerate them from the consequences of their having failed to divulge the important fact on which the whole scheme turned; and the result is that, in my opinion, if in this case any one of the shareholders in *Overend, Gurney, & Co.*, had, shortly after the shares had been allotted to him, discovered, either by inspection of the books or otherwise, the facts appearing in the papers before me, and had stated them in a bill, and had required his shares to be cancelled and his money to be returned, this Court would not have hesitated to give him the relief he asked for, or, if that was impossible, would have made the directors personally liable to make good to him the losses he had sustained.

There is, however, one view of this case, that was presented to me by Mr. *Roxburgh*, to which, though it does not, in my

opinion, alter the view I have taken of the case, it is necessary to refer. It is suggested that the public were not asked to become shareholders in a company formed to carry on the business of *Overend, *Gurney & Co.*, which had been bought [117 by the directors, but that they were invited to confide to the directors to make that purchase, and to complete the whole arrangement for that purpose, and that the whole management of it was confided to them, and that the shareholders cannot now complain, the more so as the directors, having been themselves deceived, cannot be supposed to have intended to deceive the public. But in truth, if this were so, it would leave the matter exactly in the same position, because it was equally the duty of the directors to inform the persons whom they asked to authorize them to buy the business at half a million what they had ascertained to be the state of the concern before they reposed that trust in them. But in truth this company does not in the least differ from the multitude of other companies which have been founded on the purchase of private businesses, and which are all subject to the same rules and governed by the same equities. I retain therefore my opinion, that a shareholder who came in sufficient time would have been enabled to get rid of his contract to take shares, or obtain indemnity from the directors.

This, however, does not dispose of the present case. There are two other considerations which must be carefully borne in mind and examined in this case. The Plaintiff was not an allottee of these shares. Does the case of deception apply to the case of a transferee, as well as to the case of an allottee? And still more (which applies to both cases in a greater or less degree), does the Plaintiff come in sufficient time and with sufficient diligence to induce this Court to interfere in his favor?

As regards these two latter considerations, the facts appear to me to press strongly against the Plaintiff. In considering them I am, of course, assuming that if the matter had been brought immediately to the cognizance of the Court the allottees could have renounced their shares and could have required to be repaid their advances, or could have obtained indemnity. But a question of considerable importance and of a distinct character arises as regards the transfer of a share, namely, whether the misconduct of the directors is a vice that taints the share itself,

into whosesoever hands it passes, or whether the share itself is purified by the conduct of the allottee or any subsequent holder
118] of the share. I will endeavor *to illustrate my meaning by an example. Directors are guilty of improper concealment and of unfounded representation; an allottee who takes a share discovers their misconduct, and calls on the directors to cancel his share; they consent, but point out to him that the other advantages of the scheme are so great that it will still in all probability succeed — a circumstance which might possibly have occurred in the present case. The allottee, after fully considering the matter, resolves to keep the share, notwithstanding the misconduct of the directors, and afterwards he sells his share to *A.* Can *A.* proceed against the directors, or is his remedy limited to an action against the original allottee? Of course the same point would arise in the case of laches or of undue influence. The decided cases seem to be at first sight not quite in harmony with each other on this point. The cases of *Blain* v. *Agar* (1) and *Duranty's Case* (2) seem to point one way; while *Bedford* v. *Bagshaw* (3) seems to point in a different direction. But I think these cases are reconcileable, and that if the allottee is barred by time or condonation, the transferee is bound also by the same bar. If I intended to proceed entirely upon this ground, it might, I think, require further investigation; but as the matter now stands, and being of opinion that the Plaintiff could do no more than the original allottee could have done, I think the original allottee was cognizant of the whole matter.

But besides this objection to the Plaintiff's demand, I think the delay of the Plaintiff in instituting proceedings in this case is fatal to his success. It is necessary, in considering the question of time, to keep distinct the case where the holder of the share repudiates his contract, and applies to this Court to annul it, and to remove his name from the list of shareholders, and the case where, being unable to obtain this latter relief, he applies to make the directors answerable for having induced him to take the shares. Here, whatever may have been the misconduct of the directors, the repudiation of the shares and the cancellation of the contract is not open to the Plaintiff, nor indeed is it asked for by the Plaintiff's bill; for though the conduct of the directors as regards the suppression of truth and the

(1) 1 Sim., 37; 2 Sim., 289. (2) 26 Beav., 268. (3) 4 H. & N., 538.

misstatement of fact must *be treated alike in both cases, [119 and I have consequently so dealt with it in the observations I have already made, yet the time which has elapsed, and the order for the winding-up of the company, have entirely shut off the Plaintiff from obtaining the former branch of relief; it having been settled in this very case, under the name of *Oakes* v. *Turquand* in the House of Lords, and also in *Kent* v. *Freehold Land and Brickmaking Company* (1), that in order to obtain the first branch of the relief — namely, the cancellation of the shares and the return of the deposit — the repudiation of the shares must be by bill, which must be filed before the winding-up of the company has commenced, as was the case in *Reese River Silver Mining Company* v. *Smith* (2).

The question here is, therefore, reduced to this: whether the personal liability of the directors depends on the same or on similar principles as regards the time when that relief is sought, as it does when the cancellation of the contract is asked; or whether there is any, and if any what, lapse of time which will bar the shareholder from requiring the personal indemnity of the directors who have improperly induced him to take the shares. I intend by no means to lay down a hard and fast line that the liquidation of the company bars all this relief, as it does the cancellation of shares; and it is also true that the usual rule of equity is, that a man is entitled to relief as soon as he discovers the fraud practised on him, and that he is not barred by time previously elapsed; but it is also true that this rule does not apply to a case where a man wilfully shuts his eyes, and refuses to investigate the matter, which, upon principles of ordinary common sense, he is called upon to do. When a man takes shares in a company he ought to ascertain at once whether the representations on the faith of which he took his shares are correct or not. I apply the word "representations" in the largest and most general sense; for where a man conceals an important fact, it is virtually equivalent to a representation that the fact concealed does not exist, and in all such cases the allottee ought, by investigation of the books and inquiries from the directors, to ascertain the real state of the case. If he postpones doing so for an unreasonable time this Court will not relieve him. What is an unreasonable time must de-

(1) Law Rep., 3 Ch., 493. (2) Law Rep., 4 H. L., 64.

120] pend upon *circumstances; but unquestionably a most important circumstance is the failure of the company; and if he does not apply for redress before that event it becomes rigidly incumbent on him to show why he did not come sooner; and though no technical rule, as in the case of the cancellation of shares, applies as regards the liability of directors, yet morally, and so far as equity is concerned, the same principle applies to both cases. I do not mean to say there may not be cases where there have been criminal falsification and concealment in the strictest sense of the word, and devices used to prevent investigation, where the mere failure of the company would not bar the applicant who sought to make the directors liable; but the burden of proof falls on him to show that it is not the mere failure of the company which has caused this proceeding. In ordinary cases a shareholder must apply at once without watching for the success or failure of the scheme. The Plaintiff in this case did not apply for shares to be allotted to him, but bought shares in the market, in October, 1865, and again at the beginning of January, 1866; but he never made any inquiry into the matter or the condition of the concern until after the failure of the company, which was on the 10th of May, 1866, when the bank stopped. I consider that in this matter, Mr. *Peek* cannot, as I have already stated, be put in a more favorable position than if he had been an original allottee. The consequence is, that from July, 1865, when the original prospectus was issued, until May, 1866, no sort of inquiry was made by him, nor was any investigation attempted; nor do I believe that any investigation would have taken place, or any inquiry have been made down to the present time, had it not been for the failure of the company. There is no conduct more rigidly reprobated in equity than the system of playing fast and loose — the intention of adopting a company if successful, and repudiating it if it fail — of calling upon directors for indemnity for the suppression of facts if the plan be disastrous, and of condoning it if the plan prosper. I am of opinion that I should be violating this principle of equity if I were to give relief in this case. I am of opinion that the Plaintiff comes too late for equity to assist him, and that on this ground I must dismiss his bill.

I now turn to the case of Mr. *Gibb's* executors. The observ-

ations I have hitherto made apply to all the surviving directors. These *observations show that as regards Mr. *Gibb's* es- [121 tate, the case, in my opinion, stands exactly in the same position as that of the others. If an allottee had, before the failure of *Overend, Gurney, & Co.*, or of their loss of credit, applied to this Court for relief, either in the way of cancellation of the shares or making the directors liable for their suppression of truth, the estate of Mr. *Gibb* would have been equally liable with the surviving directors, and the decease of one would not exonerate his estate from the liability to repair the wrong he had done. I shall treat his estate, therefore, as I should have treated him if he had been alive, and for the reasons I have stated I shall dismiss the bill as against his executors as well as against all the other defendants. But I shall dismiss the bill without costs, and I do so for this reason, which I wish fully to explain: that, in my opinion, the directors were guilty of gross misconduct in concealing the insolvency of the old firm. Mr. *Roxburgh*, in a very able part of his argument, pointed out many passages in which the words "a dishonest and nefarious purpose," or equivalent expressions, were employed in the bill as applicable to the directors. He observed justly that the Court treated with great severity charges of fraud where they were not proved; and he referred to observations of mine in former cases where I have repudiated any distinction being taken between equitable fraud and moral fraud, and where I have stated that all fraud was dishonest and must be treated as such. He then referred to the trial on the indictment, to show that they had been acquitted of all criminal fraud, and he thence inferred that they were acquitted of all moral fraud and therefore of all equitable fraud; and that as a necessary consequence the bill must be dismissed with costs. This same line of argument was adopted generally for the defence. I assent in a great measure to the argument, which at the time, and since, I thought very ably put, and which I have endeavored to state as fairly as I can; but it appears to me to involve this assumption, which I think erroneous, viz., that all frauds are of equal moral intensity. But it is not because all frauds are dishonest, and all frauds are treated as such in a Court of Equity, that therefore there is no distinction between one species of fraud and another. Some are of much deeper dye than others; and it is not until the

122] frauds *assume such deep dye, that they are cognizable by a Court of criminal jurisdiction. It is not that they are not all highly culpable in an extended moral sense, but that they are not all criminal in the sense that, under the statute passed for that purpose, they can be taken notice of in a Court of criminal procedure. The case of *Burrowes* v. *Lock* (1) affords an illustration of what I wish to convey. The trustees there said that there was no prior charge on the fund; there was such a charge, but they had forgotten it; they were compelled in equity to make it good. It is obvious that, if this transaction had occurred yesterday, no criminal indictment could have been maintained against them; they would have been triumphantly acquitted. But were they therefore absolved in equity? Far from it. Whether they had or had not forgotten the matter was a thing between themselves and their own consciences; no one could prove it; but they were bound to know the truth and to tell it, and equity treated them exactly as if they had known it. Suppose it to have been proved in that case that the trustees did remember the prior charge when they denied its existence, but that they did so in the belief that the estate was sufficient to discharge both, and that on a criminal indictment they had been found not guilty, having in fact no object to gain or advantage to obtain: would that fact have paralyzed the arm of equity, and would it have exonerated them from the consequence of having innocently said what was false? Certainly not. This is a similar case. Here the directors were not only bound to know the state of the concern, but they did actually know it, and they suppressed the fact. They did so innocently in this sense, that they did not gain, and did not seek to gain, any advantage to themselves by such concealment; but they were nevertheless highly culpable in a moral point of view, although the act was not one cognizable in a Court of criminal procedure, but was one which by the English law (I think properly) is not treated as a crime. But the equitable jurisdiction and the consequences remain untouched, and I should, in my opinion, be acting improperly if I were to give costs to the persons who, in my judgment, have by their misconduct occasioned the calamities caused by the failure of *Overend, Gurney,*

(1) 10 Ves., 470.

& *Co., even though the calamity has to some extent fallen upon themselves. [123

Bill dismissed without costs.

Solicitors: Mr. *W. A. Downing*; Messrs. *Young, Jones, & Co.*; Messrs. *Bevan & Whitting*; Messrs. *Wilson, Bristowes, & Carpmael*; Messrs. *Young, Maples, Teesdale, & Co.*; Messrs. *Uptons, Johnson, & Co.*; Messrs. *Maynard & Son.*

As to how far a subscriber for stock is liable upon a subscription induced by fraud, see *Collins* v. *Coggill*, 7 Robertson, 91; *Blodgett* v. *Morrill*, 20 Vermont, 509; 1 Redf. Railw., 3d ed., 158; *Downes* v. *Ship* L. R. 3 H. L., 343; Directors, etc., v. *Kesch*. L. R., 2 H. L. 99; *Oakes* v. *Turquand* L. R., 2 H. L. 325; *Waterhouse* v. *Jameson* L. R. 2 Scotch & Div. App. 29; *Western, etc.* v. *Addie* L. R. 1 Scotch & Div. App., 145.

M.R. Nov. 9, 10, 1871.

Richardson v. Morton.

[Law Reports, 13 Equity Cases, 123.]

[1870 R. 178.]

Legacy to Infant — Charge on Real Estate if Personal Estate deficient — Waste by Executor — Time when Deficiency to be ascertained.

Where a legacy to an infant, with interest for maintenance till twenty-one, was charged on testator's real estate, if the personal estate should be inadequate, and the personal estate was sufficient for all the purposes of the will at the time of the testator's death, but was subsequently wasted by the testator's personal representative:—

Held, that the legacy could not, on the infant attaining twenty-one, be made chargeable on the real estate.

John Morton, by his will, dated the 27th of June, 1855, bequeathed to *Thomas Richardson*, then an infant, the sum of £350, with interest at 4 per cent. till he should attain twenty-one, to be paid to his father in the meantime for his maintenance; and after certain other legacies the testator gave his estate at *Bowstead Hill* to his brother *William Morton*, and *Ann*, his wife, and the survivor of them, for life, charged and chargeable as thereinafter mentioned, and subject thereto he devised the same to his nephew *Thomas Morton* in fee; and he gave to five other nephews

and nieces £100 each, to be paid to them, without interest, when *Thomas Morton* should come into possession of his said estates; and he charged the same upon the said estate accordingly, in exoneration of his personal estate, the said legacies to be vested interests in the said legatees from the date of his will. And after making certain specific bequests the testator gave all the rest of his personal estate to his said brother, *W. Morton*, for his own 124] life, but subject to the *payment of his debts and funeral and testamentary expenses, and the aforesaid legacies; and in aid thereof, he thereby charged and made chargeable the said hereditaments at *Bowstead Hill* with the payment of the said residue of his just debts, funeral and testamentary expenses, and the bequests aforesaid, as his personal estate should be inadequate to discharge; and he appointed the said *William Morton* his sole executor.

The testator died in 1855, and his will was proved by *William Morton*.

The personal estate was sufficient for the payment of all the legacies with the duty thereon, including the duty on the legacy to *Thomas Richardson*.

The following entry was made by *William Morton* on the form supplied by the Legacy Duty Office :—

"Retained, the 20th of May, 1857, the sum of £350, being the legacy above mentioned, having first allowed or paid £10 10*s*. the duty thereon."

He also paid interest at 4 per cent. on the same legacy to the father of the infant, but did not appropriate any particular investment to answer the legacy, but left the amount mixed with his own property.

There were also other sums belonging to the testator's personal estate in his possession, amounting to £1100, retained in a similar way.

William Morton died in 1858, and appointed *James Morton* his executor and residuary legatee, leaving assets sufficient to satisfy the legacy in question.

James Morton proved the will of *William Morton*, and paid the interest on the legacy up to the beginning of 1866, but by that time he had squandered all the property, and become insolvent.

In the meantime *Ann Morton* had died, and *Thomas Morton*

had entered into possession of the real estate under *John Morton's* will.

In December, 1870, *T. Richardson* attained twenty-one, and shortly afterwards died; and his father having taken out administration to him, instituted this suit against *Thomas Morton* and *James Morton*, claiming payment of the legacy out of the estate at *Bowstead Hill*.

*Mr. *Fry*, Q.C., and Mr. *Bury*, for the Plaintiff:— [125

The legacy to the Plaintiff is chargeable on the real estate at *Bowstead Hill*.

In *Howard* v. *Chaffers* (1), where a testator gave his real estate to *A.* and *B.* for a term of 800 years, to secure payment of so much of his debts and legacies as his personal estate should be insufficient to pay, and subject thereto gave his residuary real estate to *A.* and *C.*, who were his executors, and the testator's estate at his death was sufficient to pay all his legacies, but the executors left the legacies unpaid and wasted the estate, and the term was mortgaged by the surviving executor—it was held that the legacies were charged on the term, and that the legatees were entitled to priority over the mortgagees.

So in *Humble* v. *Humble* (2), before Lord *Langdale*, real estate devised to trustees for a term for the payment of legacies if the personal estate should be deficient, was held to be subject to the payment of legacies when the personal estate had been wasted by the executors, although at the time of the testator's death it was more than sufficient.

It is true that in these cases the devisees of the estate were the same persons as the executors who wasted the personal estate, but that cannot affect the principle of the decisions, which is directly applicable to the present case. We contend that the time when the sufficiency or insufficiency of the personal estate is to be ascertained is the time when the legacy becomes payable, and when, as here, the legacy is given to an infant, that time must be when the infant attains twenty-one.

Mr. *Southgate*, Q.C., and Mr. *Mouncey-Heysham*, for the Defendants:—

The personal estate having been sufficient at the time of the

(1) 2 Dr. & Sm., 236. (2) 2 Jur., 696.

testator's death for the payment of the legacy, the real estate cannot become liable under the conditions in the will by the subsequent default of the testator's personal representative.

There is no authority directly governing the present case, which is clearly distinguishable from those relied on by the Plaintiff's counsel, where the devisees and executors were the 126] same persons. *But it would appear from several cases very similar to the one now before the Court that the real estate cannot be made chargeable if the personal estate was sufficient at the time of the testator's death.

Thus, in an *Anonymous Case* (1), where an estate was limited to trustees for payment of debts and legacies, and the trustees raised the whole money and applied it to their own use, so that the debts and legacies remained unpaid, it was resolved that the heir was entitled to the land discharged, as being liable for the debts and legacies only, not for the default of the trustees.

The authority of this case was recognized in *Carter v. Barnadiston* (2), and in *Omerod* v. *Hardman* (3).

[The MASTER OF THE ROLLS referred to *Lawrence* v. *Blake* (4).]

In *Hepworth* v. *Hill* (5), though it was not necessary to decide the question, yet the law was assumed to be in accordance with the Defendant's contention.

In the present case the executor, by the way in which he filled up the form for the legacy duty, acknowledged that he retained the legacy, thereby making himself a trustee and not an executor, and the testator's estate was thereby discharged. This is clear, from the principles laid down in *Phillipo* v. *Munnings* (6).

Mr. *Fry*, in reply:—

With respect to the contention last raised, I submit that the executor was bound to pay interest on the legacy at 4 per cent. out of the general assets of the testator until the infant attained the age of twenty-one. He could not, therefore, so appropriate the legacy as to make himself a trustee. The executor could

(1) 1 Salk., 153.
(2) 1 P. Wms., 505.
(3) 5 Ves., 722, 736.
(4) 8 Cl. & F., 504.
(5) 30 Beav., 476.
(6) 2 My. & Cr., 309.

only have discharged himself by paying the legacy into Court under the *Legacy Duty Act*, 36 Geo. 3, c. 52, s. 32. Even if the legacy had been appropriated, and from any cause proved deficient at the time of payment, the legatee might go against the real estate; *Gordon* v. *Bowden* (7); *May* v. *Bennett* (8). If from any cause whatever the personal estate proves insufficient for the payment of *the legacy, then when the infant attains [127 twenty-one he is entitled to have his legacy paid out of the real estate.

Nov. 10. Lord Romilly, M.R.:—

I have looked very fully into the point raised in this case, and I see no reason to hold that the real estate is liable to pay the legacy in question.

The condition on which the real estate is charged is that the personal estate should be insufficient to pay the legacy. Now if a legacy were given to a person on condition that he should not be in possession of a certain estate at the particular time of the testator's death, he would not be entitled to it if he were then in possession, and it would be immaterial if he ceased to be in possession afterwards. So here a legacy is given payable out of land if the personal estate is deficient at some particular time, and if it is not deficient at that time it is immaterial that it becomes deficient afterwards. All I have to do, then, is to determine the time at which the value of the personal estate is to be estimated. This, therefore, raises the question argued by Mr. *Fry*, as to what was the time for payment of the legacy.

Now the time at which a legacy is payable is not altered in the legal sense of the term because the person entitled to it is an infant. This was a vested legacy from the first, and the legatee, though not entitled to spend it while an infant, was entitled to have it secured; and steps might have been taken for that purpose. But it was not necessary to do so, because the executor in whose hands it was, *William Morton*, was a person of substance, and he admitted that he held the sum on account of the infant, and paid the interest regularly. He died, and his son came into possession of this legacy money and of considera-

(7) 6 Madd., 342. (8) 1 Russ., 370.

ble property besides. In a few years, however, he wasted it all, and was left penniless. No step whatever was taken for the purpose of preserving the legacy when it was found that *James Morton*, after his father's death, was beginning to squander his money, though the present Plaintiff was the father of the infant legatee, and might have taken measures to secure it. This might have been done, indeed, at any time after the testa-
128] tor's death, and I must hold that that was the time at which the sufficieney or insufficiency of the personal estate was to be determined. The estate might, no doubt, have become unexpectedly greater or less in value after that time, but as that has not happened, it is immaterial for the present purpose to consider what the consequences might be. The condition on which the legacy was to be payable out of the land has not been fulfilled, and consequently the case fails.

I have examined the cases which were cited, and am of opinion that in those in which the devisee of the land was also the personal representative who wasted the estate, the identity of the two characters prevented them from raising the defence which has succeeded here.

Solicitors for the Plaintiff: Messrs. *Sharp & Ullithorne*, agents for Messrs. *Hodgson & McKeever, Wigton.*

Solicitors for the Defendants: Messrs. *Jennings, White, & Buckston*, agents for Messrs. *S. & S. G. Saul, Carlisle.*

M.R. Dec. 9, 11, 1871.

Attorney-General v. Fletcher.

[Law Reports, 13 Equity Cases, 128.]

Will — Construction — Joint Tenancy or Tenancy in Common — "Between."

Under a gift in a will to such of the nephews and nieces of *A.* and the children of *A.'s* deceased niece *B.* thereinafter named (then followed the names of the nephews and nieces and children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally and not *per capita*, the children of *B.* taking between them only the equal share to which *B.* would have been entitled if named in that be-

quest instead of her children, and living at the time of the decease of the testatrix :—

Held, that the children of *B.* took as tenants in common.

THIS was a petition for payment out of Court of a fund standing to a separate account in the cause, which was bequeathed by the will of *Ann Fletcher*, dated the 5th of April, 1830 (subject to two life interests, both of which had expired) unto such of the nephews and nieces of her late husband and the children of his deceased niece *Ann Clarke*, thereinafter named, that is to say (then *followed the names of the nephews and niece [129 and the children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally and not *per capita*, the children of the said *Ann Clarke* taking between them only the equal share to which the said *Ann Clarke* would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix.

The question was, whether the children of *Ann Clarke* took as joint tenants or tenants in common.

Mr. *Davey*, for the Petitioner, a child of *Ann Clarke*, who had survived the determination of both life interests, submitted that the children of *Ann Clarke* took as joint tenants. The direction that the fund should be divided among the parties equally *per stirpes*, only created a tenancy in common as between the children of *Ann Clarke* and the other parties entitled; but did not show any intention on the part of the testatrix that the children of *Ann Clarke* should themselves take as tenants in common: *Bridge* v. *Yates* (1); *Lamphier* v. *Buck* (2); *Penny* v. *Clarke* (3).

Mr. *F. A. Lewin*, for a Respondent in the same interest, cited *Coe* v. *Bigg* (4); *Leake* v. *Macdowell* (5).

Mr. *Badcock*, for the representatives of a deceased child of *Ann Clarke*, admitted the rule as laid down in the cases cited, but contended that in this case there were double words of severance, viz., "to be divided equally between and among them;" and "taking between them." The use of the word "between"

(1) 12 Sim., 645.
(2) 2 Dr. & Sm., 484.
(3) 1 D. F. & J., 425.
(4) 1 N. R., 536.
(5) 32 Beav., 28.

was sufficient to create a tenancy in common: *Lashbrook* v. *Cock* (1).

Mr. *Everitt*, for Respondents in the same interest.

Mr. *Chapman Barber*, and Mr. *Cookson*, for other parties.

Mr. *Davey*, in reply:—

In *Lashbrook* v. *Cock* it was impossible to give effect to the 130] *words "between them" in any other way than by holding that they created a tenancy in common. Here the words are equivalent to "as between themselves," or "*inter se*," neither of which expressions would have constituted a tenancy in common. In giving judgment in *Bridge* v. *Yates* (2) the Vice-Chancellor speaks of persons taking "as joint tenants as between themselves;" showing clearly that in his opinion the use of the word "between" was not inconsistent with a joint tenancy.

Dec. 11. LORD ROMILLY, M.R.:—

I am of opinion that the children of *Ann Clarke* took as tenants in common. The case of *Lashbrook* v. *Cock* (1) is a distinct authority that the use of the words "between them" creates a tenancy in common, and I believe that I have always followed that decision.

Mr. *Davey* founded an ingenious argument on the language of the Vice-Chancellor *Shadwell*, in giving judgment in *Bridge* v. *Yates*; but all that he there meant to say was that two families might take as between the families as tenants in common, but that when you came to the families themselves, the members of each family took as joint tenants; and I do not think that case affects the matter.

Solicitors: Messrs. *Ellis* &. *Ellis*; Messrs. *Lewin* & *Co.*; Messrs. *Vizard, Crowder*, & *Co.*; Messrs. *Merediths, Roberts*, & *Mills*.

(1) 2 Mer., 70.

(2) 12 Sim., 645.

M.R. Dec. 13, 14, 1871.

*Bubb v. Yelverton. [131

[Law Reports, 13 Equity Cases, 131.]

[1868 B. 316.]

Will — Legacy to Executor who does not act — Words "my friend P." and "as a remembrance."

Testator appointed his "friend" *P.* his executor, and gave him a legacy "as a remembrance." *P.* did not act as executor :—

Held, that he was entitled to the legacy without proving the will.

The Marquis of *Hastings*, by his will, dated the 17th of June, 1868, appointed *Hastings Yelverton* and his (the testator's) "friend" *Henry Padwick* trustees and executors of that his will, and gave to each of them a legacy of £1000 "as a remembrance."

The will was proved by *Yelverton* alone, power being reserved to *Padwick* to come in and take out probate.

Padwick had never acted as executor, and was a creditor of the testator's estate in a large amount, which had since been paid off.

A Petition was presented by *Yelverton*, praying, among other things, that the legacies to himself and to *Padwick* might be paid; and the question was, whether *Padwick*, not having proved or acted as executor, was entitled to the legacy.

The *Solicitor-General* (Mr. *Jessel*), and Mr. *C. Hall*, for Mr. *Padwick* :—

This legacy is not given to *Padwick* simply in his character of executor, as he is described as the testator's "friend," and it is said to be given "as a remembrance." When a legacy to executors is accompanied by such words, it is payable whether or not they act in the execution of the will. Thus, in *Burgess* v. *Burgess* (1), a legacy by a testator to trustees and executors as a mark of his respect for them was held not to be revoked by a codicil appointing new trustees and executors with the same legacy as the others. *In re Isabella Denby* (2) was a similar decision; for there a legacy to "my friend, *J. S.*, one of the exe-

(1) 1 Coll., 367. (2) 3 D. F. & J., 350.

cutors of this my will," was held not to be conditional on his acceptance of the office.

In the present case, if necessary, Mr. *Padwick* submits to prove the will.

132] *Sir *Roundell Palmer*, Q.C., and Mr. *Pemberton*, for the residuary legatees:—

Where a legacy is given to an executor, the presumption of law is that it is given to him in his character of executor, and if he does not act, he is not entitled to receive it: *Williams* on Executors (1); *Stackpoole* v. *Howell* (2). In *Read* v. *Devaynes* (3) an executor was held not to be entitled to a legacy without proving the will, though it was expressed to be a mark of gratitude for past favors. In *Burgess* v. *Burgess* (4) the legacy was expressed to be "as a mark of respect," which is a much stronger expression than the words "as a remembrance," which we find here.

Mr. *Southgate*, Q.C., Mr. *Roxburgh*, Q.C., Mr. *Fry*, Q.C., Mr. *C. T. Simpson*, Mr. *Horton Smith*, and Mr. *Kekewich*, for other parties.

Dec. 14. Lord Romilly, M.R.:—

I think Mr. *Padwick* is entitled to the legacy. I have looked through the cases on the subject, and I think this legacy was clearly given to him for his own benefit. It is given "as a remembrance." A remembrance of what! A remembrance, I suppose, of his friendship; for the testator calls him his friend, and also makes him an executor. I am of opinion he is entitled to the legacy without proving the will.

Solicitors: Messrs. *Wordsworth, Blake, Harris, & Parson*; Messrs. *Horn & Murray*; Messrs. *Lanfear & Stewart*.

(1) Vol. ii. 4th Ed. p. 1100.
(2) 13 Ves., 417.
(3) 3 Bro. C. C., 95.
(4) 1 Coll., 367.

M.R. Dec. 18, 19, 1871.

*Longley v. Longley. [133

[Law Reports, 13 Equity Cases, 133.]

[1871 L. 115.]

Will—Construction—Devise and Bequest of Estate and Effects to Trustees, their Heirs, Executors, and Administrators—Trusts applicable to Personalty only—Real Estate—Resulting Trust.

A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, upon trust to convert his personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects upon trust to invest the same in Government or real securities, and to stand possessed of such investments upon trusts for the benefit of the widow and children and brothers and sisters of the testator:—

Held, that the real estate of the testator passed to the trustees, but that the beneficial interest therein was undisposed of by the will, and consequently resulted to the testator's heir.

Dunnage v. *White* (1) followed. *D'Almaine* v. *Mosely* (2) considered.

Arthur Longley, by his will, dated the 17th of March, 1856, directed that all his just debts and funeral and testamentary expenses should be paid by his executrix and executors thereinafter appointed as soon as conveniently could be after his decease: and subject thereto he gave, devised, and bequeathed unto his brother *Henry Longley*, and *Richard Hatchett*, all his stock-in-trade, household furniture, plate, linen, china, books, moneys, moneys standing in his name in the funds, book debts, securities for money, policies of insurance, and all sums of money that might be received or recovered thereunder, and all other the estate and effects of which he should be possessed, entitled to, or interested in at the time of his decease, and of whatever nature or kind or wheresoever the same might be; to hold the same and every part thereof unto the said *Henry Longley* and *Richard Hatchett*, their heirs, executors, and administrators, according to the nature and quality thereof respectively, upon the trusts and for the ends, intents, and purposes thereinafter expressed and declared of and concerning the same; that was to say, that they, the said *Henry Longley* and *Richard Hatchett*, or

(1) 1 Jac. & W., 583.

(2) 1 Drew, 629.

134] the survivor of them, or the *heirs, executors, or administrators of such survivor, or other the trustees or trustee for the time being of that his will, should, as conveniently might be after his decease (unless his wife, *Emma Longley*, should wish the same to be carried on as thereinafter mentioned), sell and dispose of his trade or business of a hosier and draper, then carried on by him in *High Street, Southwark*, and of the goodwill thereof, for the most money that could be got for the same, and get in his outstanding debts; and also convert into money all such of his personal estate as should not consist of money; and also make, execute, and perfect, all necessary and proper deeds, writings, and assurances for the purpose of vesting the same in any purchaser or purchasers thereof. And, after declaring that the receipt or receipts of the trustees or trustee for the time being of that his will should be good and valid acquittances to the said purchaser or purchasers for all the moneys expressed in such receipts to be received, and that no such purchaser or purchasers, after paying his, her, or their purchase-money to the said trustees or trustee, or to his or their order, should be answerable for the application, misapplication, or nonapplication thereof, or of any-part thereof, he further directed that they, his said trustees, and the survivor of them, and the executors and administrators of such survivor, should stand possessed of and interested in the money to arise by such sale or sales, and also of and in the rest and residue of his estate and effects upon trust to lay out and invest the same in the purchase of Parliamentary stocks or funds of *Great Britain*, or upon real securities at interest, in the names of them, the said trustees, for the time being of that his will; and should alter, change, and vary the same as and when they should think fit; and should stand possessed of and interested in the said stocks, funds, and securities, upon the trusts and for the ends, intents, and purposes, and with, under, and subject to the provisoes, conditions, and declarations thereinafter declared concerning the same—that was to say, upon trust to stand possessed thereof, and to receive the interest, dividends, and annual produce arising from such stocks, funds, and securities, and pay the same to his said wife, *Emma Longley*, during the term of her natural life, or until she married again, whichever should first happen, for her own sole and 135] separate use and benefit; and from and *immediately

after the second marriage or decease of his said wife it was his will, and he did thereby direct and declare, that his said trustees or trustee for the time being of that his will should stand possessed of and interested in all and singular the said trust moneys, and the funds and securities upon which the same should be placed or invested upon trust for all and every his children living at the time of such second marriage or decease of his said wife, equally to be divided between them, share and share alike; and if there should be only one such child living at the time of his said wife's second marriage or decease, then he directed that the whole of such stocks, funds, and securities should be for the sole use and benefit of such one child; it was, however, his will and intention that such of his children as were sons should not attain a vested interest in such stocks, funds, and securities before they should respectively attain the ages of twenty-one years; and that such of them as were daughters should attain such vested interest therein on attaining their respective ages of twenty-one or on marrying, whichever should first happen; and that until his said children should respectively attain such vested interests, that the said trustees or trustee for the time being of that his will should pay and apply the interest, dividends and annual produce arising from such trust funds and securities for the maintenance, education, and support of such children; and if there should be only one child then living, the whole for such one child; and he further directed and declared that if, at the time of the second marriage or decease of his said wife, there should be no such child or children living, then he thereby declared that the whole of the trust moneys, funds, and securities should be divided equally between and amongst all his brothers and sisters as should then be living, to be held and enjoyed by them for their own sole and separate use and benefit absolutely: Provided, nevertheless, that if his said wife should be desirous that his said business should be carried on after his decease, then he directed that his said trustees or trustee for the time being should carry on and conduct the same as advantageously as possible for the benefit of his said wife and children, until the decease or second marriage of his said wife, or until the youngest of his children then living should attain the age of twenty-one years: and he further directed and declared *that the clear profits arising from [136

such business should be applied to and for the sole benefit of his said wife until her decease or second marriage, and afterwards for the benefit of such of his children as should be then living, and after the youngest child should have attained his or her majority (and after the decease or second marriage of his said wife), then he directed that the said business should be sold, and the produce arising from the sale thereof be held by the trustees for the time being of that his will, and applied to and for the benefit of such of his children as should be then living, or if all were dead, for his brothers and sisters then living in a similar manner, and upon the trusts thereinbefore expressed with respect to the trust funds arising from the sale of his stock-in-trade, goodwill, and personal estate and effects, if the same were made immediately after his decease as aforesaid, or such of them as might be then capable of taking effect. And he appointed *Emma Longley*, *Henry Longley* and *Richard Hatchett*, executrix and executors of his will.

The testator died in January, 1871, leaving two sons, the Plaintiffs, him surviving. He was at the time of his death entitled both to freehold and copyhold estates; and this suit was instituted for the purpose of obtaining the opinion of the Court whether the testator had by his will effectually disposed of the beneficial interest in such real estate.

Mr. *Southgate*, Q.C., and Mr. *B. B. Swan*, for the Plaintiffs, who were respectively the heir-at-law and the customary heir of the testator:—

It might be contended on the authority of *Doe* v. *Buckner* (1) and *Doe* v. *Hurrell* (2) that the real estate did not pass by the will, but these cases have been questioned; and the construction for which we contend is, that the real estate passes, but that the beneficial interest is undisposed of, inasmuch as the trusts are exclusively applicable to personalty: *Dunnage* v. *White* (3); *Coard* v. *Holderness* (4). If that be so, there is a resulting trust in favor of the Plaintiffs.

137] *The strongest case against this construction is *D'Almaine* v. *Moseley* (5), where, under a gift of all the residue of a

(1) 6 T. R., 610.
(2) 5 B. & A., 18.
(3) 1 Jac. & W., 583.
(4) 20 Beav., 147.
(5) 1 Drew, 629.

testator's estate and effects upon trust to collect, get in, and recover the same, and invest the same in stock, it was held that real estate passed. The Vice-Chancellor went mainly on the ground that the trusts of the will were as inapplicable to leaseholds as to realty; yet it could not be contended that leaseholds did not pass. It is submitted that this reasoning is unsatisfactory, and does not, at all events, apply to the present case; for here the two trustees are also executors, and the leaseholds would pass to them independently of any gift. Moreover, the testator expressly confines the trust for sale to his personal estate; then he directs the money to arise from the sale and all the residue of his estate and effects (under which words, if at all, the real estate must pass) to be invested in stock. Real estate can be so invested only by selling it; but how is it possible to imply a trust for sale of real estate when the express trust for that purpose is confined to personalty?

Mr. *Oswald*, for trustees.

Mr. *Ramadge*, for the brothers and sisters of the testator, relied mainly on *D'Almaine* v. *Moseley* and *Fullerton* v. *Martin* (1) as answering the argument for the Plaintiffs; and he cited *Patterson* v. *Huddart* (2) and *Lloyd* v. *Lloyd* (3) as showing that the circumstance that the trusts were less applicable to realty than to personalty had not prevented the Court from holding that the beneficial interest in real estate was effectually disposed of.

Mr. *Southgate*, in reply.

Dec. 19. LORD ROMILLY, M.R.:—

I have carefully gone over this will, and I think that the testator's real estate passed by it. That is shown by the use of the word "devise" in the gift and the word "heirs" in the limitation to the trustees. But I think the trusts are rigidly and *exclusively applicable to personal estate, and I must, [138

(1) 22 L. J. (Ch.), 893; 17 Jur., 778. (2) 17 Beav., 210.
(3) Law Rep., 7 Eq., 455.

therefore, follow *Dunnage* v. *White* (1), and hold that there is a resulting trust in favor of the Plaintiffs.

Solicitors: Mr. *W. Sturt*; Messrs. *Wilkinson & Howlett.*

V.-C.M. Nov. 24, 1871.

144] *Pennock v. Pennock.

[Law Reports, 13 Equity Cases, 144.]

[1869 P. 181.]

Will — Construction — "Property" or "Power" — "Power to take and apply."

A testatrix having a power under a marriage settlement to appoint certain shares of real estate made an appointment to her husband "in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising and to arise therefrom for his own absolute use and benefit, for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband," over:—

Held, that the husband took a life interest with a power of appointment, and that, on his death without having exercised the power, the gift over took effect.

Robert Kitching, who died on the 21st of June, 1865, by his will, dated the 19th of December, 1863, gave one-eighth share of his residuary real and personal estate in trust for his cousin *Hannah Hurst*, the wife of *John Hurst*, her heirs, executors, administrators, and assigns.

By an indenture dated the 5th of July, 1869, and made between *Hannah Hurst* and *John Hurst* of the one part, and *William Watson* of the other part, and duly acknowledged by *Hannah Hurst*, the eighth share of *Hannah Hurst* in the testator's real estate, and a ninth part of another eighth share which had devolved upon her, were conveyed to *William Watson* and his heirs, to such uses as *Hannah Hurst* during her then or any future coverture should by deed or will appoint.

Hannah Hurst by her will, dated the 4th of January, 1870, after reciting the indenture of the 5th of July, 1869, proceeded as follows: "Now I, the said *Hannah Hurst*, by virtue and in

(1) 1 Jac. & W., 583.

exercise of the said power and authority given to me by the said in part recited indenture of the 5th day of July, 1869, and all other powers or authorities enabling me, do hereby direct, limit, and appoint all the said parts and shares of and in the said messuages, cottages, farms, closes, lands, tithes, hereditaments, and real estate, which I have power to direct, limit, and appoint, by virtue of the before mentioned indenture, unto my said husband John Hurst, his *heirs, executors, administrators, [145 and assigns, in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising and to arise therefrom, for his own absolute use for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit; and from and after the decease of my said husband I direct the same, subject as aforesaid, to be equally divided amongst such of my nephews and nieces as shall be then living, and the two children of my late nephew *Joshua*, they taking one share equally between them; and I give to my said husband full power to sell my said estates, either together or in parcels, by public auction or private contract, and subject to any special conditions of sale or otherwise, and to give good discharges and receipts for all moneys he may receive."

A suit was instituted for the administration of the estate of *Robert Kitching*, and under the decree, dated the 29th of January, 1870, his real estate not specifically devised was sold and the proceeds paid into Court.

Hannah Hurst died on the 9th of June, 1870, and *John Hurst* died on the 23d of June, 1870, intestate, and without having made any appointment under his wife's will, and in pursuance of the order on further consideration dated the 1st of August, 1871, £1327 6*s.* 5*d.* 3 per cents., and £80 5*s.* 1*d.* cash, which together represented the shares of *Hannah Hurst*, were carried to a separate account.

A petition was now presented on behalf of the nephews and nieces to have the fund paid out to them.

Mr. *Glasse*, Q.C. (Mr. *Nalder* with him), for the Petitioners:—

The fund represents real estate, and the will must be construed accordingly; and as there is a life estate by express words, the expressions following must be taken in their literal meaning,

as giving only a power of appointment, with a gift over to the nephews and nieces in default of appointment: *Reith* v. *Seymour* (1); *Doe* v. *Glover* (2); *Bradley* v. *Westcott* (3).

Mr. *Glasse* was then stopped by the Court.

146] *Mr. *Pearson*, Q.C., and Mr. *Marten*, for the heir-at-law of the husband:—

It is important to bear in mind the distinction between "property" and "power." The question is, whether upon the authorities the words are to be treated as giving property, for if so the whole was given to the husband, and the gift over cannot take effect. *Doe* v. *Glover* (4) has been overruled by *Holmes* v. *Godson* (5), which upheld *Gulliver* v. *Vaux* (6), and has been followed in *Nowlan* v. *Walsh* (7); and it is now settled that where, after a life estate or life interest, words are added which import a general power of disposition over the entire interest in the property, the property, and not a power only, is given, and a gift over cannot take effect. In *In re Maxwell's Will* (8) the words were "power to dispose of," and the words here—"power to take and apply"—are at least as strong; and *In re David's Trusts* (9) and *Weale* v. *Ollive* (10), the latest authorities are to the same effect. *Bradley* v. *Westcott* (11) was a case of a limited power to appoint by will. The absolute interest being thus conferred, the gift over is necessarily void: *Barton* v. *Barton* (12); *In re Mortlock's Trust* (13).

Mr. *Edwards*, and Mr. *J. T. Humphry*, for parties representing the share of a nephew.

Sir R. Malins, V.C.:—

This is a question of construction arising upon the will of a married woman, made in exercise of a power conferred upon her by her marriage settlement. It is admitted that the fact

(1) 4 Russ., 263.
(2) 1 C. B., 448.
(3) 13 Ves., 445, 453.
(4) 1 C. B., 448.
(5) 8 D. M. & G., 152.
(6) Ibid., 167, n.
(7) 4 DeG. & Sm., 584.
(8) 24 Beav., 246.
(9) Joh., 495.
(10) 32 Beav., 421.
(11) 13 Ves., 445, 453.
(12) 3 K. & J., 512.
(13). Ibid., 456

that the testatrix gave the property to her husband as trustee in the first instance does not affect the application of the rules of construction. [His Honor then read the part of the will above set out, and continued :—] I have been referred to several cases, such as *Holmes* v. *Godson*, *Nowlan* v. *Walsh*, and *Re Maxwell's Will*, which show that where there is a gift in words such as *are considered to confer an absolute interest, with a gift [147 over in case of the death of a person in whose favor the gift is made, such a gift over is void. In such cases it has been most reasonably held that the power of making a testamentary disposition was a necessary incident of property, and a gift over could not be made to depend upon the happening of that event. If the gift here had been "with power to appoint by deed or will," and in default of appointment to the nephews and nieces the case would have been clear; but it is said that if the testatrix had meant that she would have said so. But I think she has expressed the same thing in very felicitous language, and in fewer words. It might also be asked why, if she intended an absolute gift, she expressed it to be for life only, and with perfect consistency followed it by a power of appointment and a gift over "from and after the decease" of her husband. It is argued that I must apply a strict rule of construction, and treat all those expressions as vain; but I am of opinion that the whole clause must be taken together as it stands; and that the husband had a life estate, with a power to acquire the entire interest if he wanted it, but that if he did not acquire it there was a gift over to the nephews and nieces. The result was that he died without doing anything to acquire the absolute interest, and the gift over must take effect.

Amongst the cases cited, *In re Maxwell's Will* (1) was very much pressed upon me. There a testator, after giving a fund to his son for life, and afterwards, in case of the son's death, leaving lawful issue, directing his executors to pay the fund to the son's surviving children, continued: "But if he should die without lawful issue, I give and bequeath a moiety of the said capital stock to be disposed of as my said son shall think proper;" and the son having died without issue, that was held to be an absolute gift of the moiety. That would also have been my construction of the words, and I think them perfectly clear.

(1) 24 Beav., 246.

pelled to pay in an action brought against him as a surety by the company.

On the 19th of February, 1863, *J. K. Tyrie* effected a policy (9322) for £2000 on his own life with the *Sovereign Life Assurance Company*, and on the 21st of February mortgaged the policy to the office as security for a loan of £1000.

On the 10th of October, 1863, *Tyrie* effected a second policy (9695) for £1000 with the *Sovereign Office*, and on the 12th of October mortgaged it to the office for £500.

On the 14th of January, 1865, *Tyrie* effected a further policy for £1000 (10,688), and on the 16th of January mortgaged that policy, together with policy 9322, to the office for £1,111. In this last mortgage the Plaintiff and one *Boyle*, who soon afterwards became bankrupt, became sureties for the repayment of the amount thereby secured.

In July, 1865, *Tyrie* became bankrupt. In September, 1865, the company sued Plaintiff as one of the sureties, and judg- [159
ment was recovered against him for £1,500 and costs. The Plaintiff had paid the company £975 16s. 10d. in part discharge of the judgment, and £24 3s. 2d. for costs. It appeared that policy 10,688 was forfeited for non-payment of the premium, and that policy 9332 became liable to forfeiture for the same reason: but in that case the policy was allowed to be reinstated upon payment by Plaintiff of the premium and interest.

On the death of *Tyrie* in September, 1867, two sums of £1000 and £1000 became payable to his assignee from the office, in respect of the two subsisting policies (9322, 9695), subject to repayment of the advances made by the company. After discharging these mortgages there remained a balance of £776 11s 10d. due upon the policies, and to establish a charge on this balance to the extent of the money which had been recovered from him as surety the Plaintiff had filed his bill, submitting that inasmuch as on taking the accounts the balance of the moneys payable in respect of policy 9322 would not, it was apprehended, be found sufficient to satisfy the charge claimed by him, he was entitled, as against *Tyrie's* assignee in bankruptcy, to have the moneys payable in respect of both policies marshalled, so as to give him the benefit of the balance of policy 9695, after satisfaction of the company's charge thereon.

It appeared, from Plaintiff's answer and his affidavit, that on

the 13th of September, 1866, he received, through his solicitor, from the wife of *J. E. Tyrie* a sum of £400, and in August, 1867, a further sum of £50. These sums, as Plaintiff was informed, were derived from the income of Mrs. *Tyrie's* separate estate independently of her husband, and he understood that the motive of her paying such sums to him was to reimburse to him (so far as they would extend) the money which she was aware Plaintiff had been compelled to pay, and had paid, as surety for her husband. Nothing was said about Mrs. *Tyrie* giving him (Plaintiff) these sums for or on behalf of her husband, or with the view of setting free for the benefit of his estate any security held by Plaintiff in respect of the payments which he had made. "On the contrary, I distinctly understood that the said gifts to me constituted a transaction in which no one but herself and I 160] were concerned, and I believe that *she made such payment or gift in discharge of what she thought a moral obligation, and not for the purpose of satisfying the liability of the said *J. E. Tyrie* upon the judgment" which was recovered by or on behalf of the company against Plaintiff and not against *Tyrie*.

The Plaintiff also stated his belief that Mrs. *Tyrie* did not either directly or indirectly pay the money either wholly or partly for the purpose of satisfying the liability of her husband upon such judgment, but that she paid such sums solely for the purpose of relieving him (the Plaintiff), as far as she could, from the inconvenience to which he was personally subjected by reason of his having become surety for her husband. The answer (of Plaintiff) also submitted that under the circumstances Mrs. *Tyrie* acquired an interest in the securities to the benefit of which he claimed to be entitled, and that he (Plaintiff) was bound to prosecute the suit, for the purpose not only of recovering the balance due to himself, but of making such securities, so far as they would extend, available for repaying her the sums so advanced out of her separate estate with interest.

Mr. *Kay*, Q.C., and Mr. *Westlake*, for the Plaintiff, contended that a surety who had paid off the debt for which he became answerable was entitled to stand in the place of the creditor, and to all the equities which the creditor could have enforced, not merely against the principal debtor but also against all per-

sons claiming under him. As against *Tyrie's* assignee, the company as creditors, would have had the right to consolidate these securities and retain their debt out of either policy; and accordingly the Plaintiff was entitled to have the securities marshalled and to be paid the whole amount which he had been compelled to pay as surety, before anything was paid to the assignee in respect of either policy: *Drew* v. *Lockitt* (1); *Wright* v. *Morley* (2); *Newton* v. *Chorlton* (3).

Mr. *Amphlett*, Q.C., for *Tyrie's* assignee, took the objection that Mrs. *Tyrie* ought to be a party to the suit, as she had reimbursed Plaintiff what he had been compelled to pay on behalf of her husband, *and she was a *cestui que trust* to that ex- [161
tent of any moneys that might be recovered in this suit.

Mr. *Kay*:—

The payment by Mrs. *Tyrie*, was a merely voluntary payment on her part, to reimburse Plaintiff for the loss he had been put to, and was in no sense a payment in the name or on behalf of her husband's assignee, so that he could afterwards adopt it or affect Plaintiff's rights. Where a person does not intend to act as an agent, there is no authority for holding that defect of intention as well as defect of authority can be cured; and the benefit of Mrs. *Tyrie's* payment cannot be claimed by her husband's assignees in exoneration *pro tanto* of the policy moneys any more than if the payment had been made by an entire stranger.

[They cited upon this point *Walter* v. *James* (4).]

Mr. *Amphlett*, Q.C., and Mr. *J. Simmonds*, for *Tyrie's* assignee in bankruptcy:—

The Plaintiff as a surety has no right to the benefit of any securities except those which were pledged for the particular debt for which he has become surety. Being surety for a part of a debt only he cannot claim the benefit of a security given by the debtor to his creditor at a different time for another part of the debt: *Wade* v. *Coope* (5); *South* v. *Bloxam* (6). The equit-

(1) 32 Beav., 499.
(2) 11 Ves., 12, 22.
(3) 10 Hare, 646.
(4) Law Rep., 6 Ex., 124.
(5) 2 Sim., 155.
(6) 2 H. & M., 457.

able right which a mortgagee has of consolidating his securities is one which he can get rid of at any time to the prejudice of those behind him; and a surety cannot stand in a better position than a second mortgagee. When the mortgagee has received his money, then, if no balance remains, the surety for the first mortgage has no equity to proceed against the surplus on a second mortgage, for which he did not become a surety: *Ex parte Rushworth* (1). With respect to the costs recovered against the Plaintiff, and added to his present demand, a surety is not entitled after defending an action to which there was no proper defence, to charge the costs against his principal: *Lampleigh* v. *Braithwait* (2).

162] *No creditor of the husband, who has received payment from the wife, even out of her separate estate, can sue the husband without deducting from his claim the amount which he has so received; and as the Plaintiff has received £450 from Mrs. *Tyrie* in repayment of the amount which he has been compelled to pay in the action, the balance of the policy moneys is to that extent set free from any claim on his behalf.

Mr. *Everitt*, for the *Sovereign Life Assurance Company*.

Sir James Bacon, V.C.:—

The Plaintiff is entitled to the right claimed by him of having the securities marshalled so as to be paid out of the balance of the policy moneys the sums which he has been compelled to pay under the judgment (including the costs of the action). Upon the other point, the payment to Plaintiff out of her separate estate by Mrs. *Tyrie* stands on the same footing exactly as a payment by an entire stranger under no liability whatever, in order to reimburse Plaintiff for the loss he had been put to on account of her husband, and such payment cannot in any way affect the rights of Plaintiff against the balance of the policy moneys.

Solicitors: Messrs. *Elmslie, Forsyth, & Sedgwick; Dubois; Davies, Campbell, & Reeves.*

(1) 10 Ves., 409.

(2) 1 Sm., L. C., 6th Ed., 139.

As to marshalling securities so that partnership property shall pay partnership's debts and individual property individual debts, see Moak's Notes to Clarke's Chy., 202, ed. 1869.

V.-C.W., Nov. 18; Dec. 5, 1871.

**In re* DAVIES' TRUSTS. [163

[Law Reports, 13 Equity Cases, 163.]

Power of Appointment — Direction to pay Debts — Bequest of Legacies and Residue — Deaths of Residuary Legatees — Lapse — Next of Kin — Wills Act, 1 Vict. c. 26, s. 27.

S. D., who had, under the will of her late husband, a general power of appointment over a moiety of his residuary estate, by will, in 1869, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate, which she had any title to or interest in, unto her brothers and sisters *M.*, *E.*, *W.*, and *J.* equally, and appointed an executor.

M. and *J.* died in the lifetime of the appointor:—

Held, that the next of kin of the husband were entitled to the shares which *M.* and *J.* would have taken if they had survived the appointor.

PETITION. *Robert Davies*, who died on the 23d of September, 1866, by will, in June, 1866, after making certain bequests, gave the residue of his estate to trustees upon trusts *inter alia*, to convert and invest the proceeds, and to pay the income unto his wife, *Sarah Davies*, during her life, and after her death, upon trusts, after the payment of certain legacies, as to one equal moiety of his residuary personal estate, for such person or persons to whom *Sarah Davies* should by will give, appoint, and bequeath the same. The testator appointed *Sarah Davies* and two others executrix and executors of his will, but one of the executors did not prove.

Sarah Davies, who died on the 13th of August, 1869, by will, dated the 5th of that month, after declaring that all her just debts, funeral and testamentary expenses, should be paid and discharged, and giving three legacies, which amounted in the aggregate to £150, proceeded as follows: "I give and bequeath all the rest, residue and remainder of my moneys in the funds, and all moneys due to me on mortgage or otherwise, and all my personal estate wheresoever and whatsoever of which I shall die possessed, or have any title to or interest in, unto my sister *Mary Minshall*, my sister *Elizabeth Green*, my brother *William Heatley*, and my brother *Joseph Heatley*, to be equally divided between them, share and share alike, as tenants in common; and I appoint *George Minshall* sole executor of my said will.

164] *Both *Mary Minshall* and *Joseph Heatley* died in the lifetime of *Sarah Davies*.

Letters of administration *de bonis non*, with the will annexed of *Robert Davies*, were, in January, 1871, granted to the Petitioner, *Elizabeth Oliver*, and she paid into Court the sum of £347 6*s*. 3*d*. cash to the credit of "In the matter of the Trusts of the Moiety of the Residuary Estate of *Robert Davies*."

Robert Davies died without leaving any issue, but he left next of kin; and they contended that the one equal fourth part of the residuary estate of *Robert Davies*, to which *Mary Minshall* and *Joseph Heatley* would have been entitled if they had survived *Sarah Davies*, and which amounted to the sum of £347 6*s*. 3*d*., formed part of the personal estate of *Robert Davies* undisposed of by his will; and that the £347 6*s*. 3*d*., together with any further moneys in the hands of the administratrix representing the said equal fourth part of the residuary estate, was distributable amongst the next of kin of *Robert Davies*; and they prayed for a declaration accordingly.

Mr. *T. N. Lawrence*, for the Petitioner:—

The question is whether the appointor intended by her will to exercise her power of appointment over the fund, so as to make it her own for all purposes, and not merely for a limited purpose. There is no gift to trustees; nor a distinct appointment of the whole of the moiety. In no way has the appointor shown an intention to make the moiety part of her personal estate for all purposes. There has been no blending of the two estates. She had sufficient funds for the payment of her debts and funeral and other expenses. If *Sarah Davies* had died in the lifetime of the testator, he would have died intestate as to this moiety; and therefore he must be treated as having died intestate as to the fund which represents the two shares.

[He cited *Easum* v. *Appleford* (1); *Bristow* v. *Skirrow* (2); *Hawthorn* v. *Shedden* (3); *Shelford* v. *Acland* (4); *Hurlstone* v. *Ashton* (5); *Hoare* v. *Osborne* (6); *In re Caplin's Will* (7); *Wil-*

(1) 5 My. & Cr., 56.
(2) Law Rep. 10 Eq., 1.
(3) 3 Sm. & Giff., 293.
(4) 23 Beav., 10.
(5) 11 Jur. (N. S.), 725.
(6) 12 W. R., 661.
(7) 2 Dr. & Sm., 527–530.

day *v. *Barnett* (1); *Chamberlain* v. *Hutchinson* (2); *Wilkinson* [165 v. *Schneider* (3); *Lefevre* v. *Freeland* (4); and *Brickenden* v. *Williams* (5).]

Mr. *Waller*, for the executor of *Sarah Davies*, contended that she had so dealt with the moiety as to bring about an amalgamation of it with her own estate: that the sum in Court representing the two shares was part of her general estate, and that, therefore, it was now divisible amongst her next of kin.

[He referred to *Wilday* v. *Barnett* (6); *In re Wilkinson* (7); *Attorney-General* v. *Brackenbury* (8).]

Mr. *Lawrence*, in reply, referred to *Silk* v. *Prime* (9), and *Tudor's* Leading Cases (10).

Dec. 5. Sir John Wickens, V.C.:—

Sarah Davies, having a life interest in the whole, and a general power of appointment over a moiety of the residuary estate of her late husband, *Robert Davies*, made her will, dated the 5th of August, 1869, by which she directed that her debts and funeral expenses should be paid and discharged, and, after giving three pecuniary legacies, proceeded as follows. [His Honor read the words above stated.]

The testatrix survived two of the four persons to whom she bequeathed the residue of her estate, and died on the 13th of August, 1869. As she lived only eight days after making her will, it is to be presumed that the two residuary legatees who died before her died also before the will was made. But this seems for the present purpose immaterial. The question is whether the next of kin of *Robert Davies*, or the next of kin of the testatrix, take the two eighth shares of *Robert Davies'* residuary estate which his widow had power to dispose of, but as to which

(1) Law Rep., 6 Eq., 193–195.
(2) 22 Beav., 444.
(3) Law Rep. 9 Eq., 423.
(4) 24 Beav., 403.
(5) Law Rep. 7 Eq., 310.
(6) Law Rep. 6 Eq., 193.
(7) Ibid. 4 Ch., 587.
(8) 32 L. J. (Ex.), 108.
(9) 1 Bro. C. C., 138, n.
(10) Vol. II. p., 95.

166] *her intended disposition failed by lapse, or something analogous to lapse.

It seems settled by the cases of *Chamberlain* v. *Hutchinson* (1) and *Wilkinson* v. *Schneider* (2)—authorities which are binding on me—that a testamentary appointment, under a general power, to *A.* in trust for *B.*, which lapses as to the beneficial interest by *B.'s* death before the appointor, operates as a good appointment in favor of *A.* who holds on the same trusts as if it had been the appointor's own property.

It must also, I think, be considered settled law that where a testator, with a general power of appointment, gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective. And even that where a testator having such a power makes a will directing the payment of his debts without more and appointing an executor, the appointed fund is liable for the payment of his debts if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed. It has not yet been decided that an appointment of an executor without more would, since the *Wills Act*, 1 Vict. c. 26, make the fund assets. And so to hold would appear to give a very unnatural construction to sect. 27 of the *Wills Act* as to the execution of powers by a general disposition. Having regard to the 27th section, it seems not unreasonable to hold that a testator having a general power, and directing a certain application of his property, must be taken in all cases to exercise the power to the extent to which the direction is effectual. The difficulty lies in extending this rule to cases where the direction is ineffectual. Of course a testator may say, "I appoint to my executor as part of my personal estate," and may expressly, or in the event, leave his personal estate undisposed of; and yet it may be held that he has nevertheless made it part of his personal estate for all purposes. But in general, where the appointment is for a limited purpose, or a purpose which fails, it would seem, on principle, that there should be no appointment at all, or none beyond the limited purpose. Unquestionably there is great difficulty in 167] construing an appointment *of, for instance, an equitable interest in a money fund to *A.* in trust for *B.* as differing from

(1) 22 Beav., 444. (2) Law Rep., 9 Eq., 423.

an appointment of the same fund to *B.*; and doubts might be suggested as to the effect of such a gift where *A.* died before the testator as well as *B.*, or where there is an appointment, for example, to a person in trust for *A.* for her separate use, with remainder to her children, no executor being named, and there being no children. Still, though there is binding authority for holding that a bequest of residue to *A.* in trust for *B.* makes the fund, subject to a general power, assets for all purposes of the appointor, it does not appear to have been yet decided that where there is no appointment to *A.*, but merely an appointment to *B.* direct, and *B.* dies before the testator, the result is the same. Here there is an appointment, which, under the old law as well as the new, would make the appointed fund assets for debts to the extent of any deficiency of the appointor's personal estate; and (at any rate under the new law) would make it assets for paying the legacies in case of a like deficiency. There is then a general gift and appointment of residue which fail as to two fourth parts of it. And the real question is, whether I am bound to hold that these two fourth parts (after payment of all debts and legacies) are effectually appointed for every purpose. No authority seems to go so far; and though to hold otherwise tends to draw a line between gifts not quite satisfactorily distinguished in principle, it seems less dangerous to do this than to adopt the opposite view, and to hold what would, in many cases, carry the effect of a will far beyond its intention. I therefore decide that the next of kin of the husband are entitled. The costs will be as between solicitor and client, and must come out of the fund; and, the administratrix requesting it, I shall direct an inquiry as to the next of kin of *Robert Davies.*

Solicitors for the Petitioner: Messrs. *Bicknell & Hortin.*
Solicitor for the Respondent: Mr. *E. Clarke.*

M.R. Jan. 12, 1872.

191] *NESHAM v. SELBY.

[Law Reports, 13 Equity Cases, 191.]

[1870 N. 60.]

Agreement for Lease — Memorandum in Writing — Correspondence — Statute of Frauds.

A bill for specific performance alleged a verbal agreement for the lease of a house by the Plaintiff to the Defendant for seven years from Michaelmas, 1870, followed, first, by a letter from the Defendant to the Plaintiff, which did not state when the term was to commence, and, secondly, by another letter of the Defendant to the Plaintiff, in which, after referring to the previous letter, the Defendant stated that he thought it best to say that it was clearly understood on his part, that the Plaintiff agreed to let the house for seven years from Michaelmas, 1870, upon certain conditions therein mentioned, some of which the Plaintiff did not admit to form part of the alleged verbal agreement:—

Held, that neither the first letter, nor the two together, constituted a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the *Statute of Frauds*.

THIS was a suit for specific performance of an agreement to take a lease of a house. The only question argued was, whether there was a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the *Statute of Frauds*.

In March, 1870, the Defendant was tenant of a house belonging to the Plaintiff, called *Ashmount*, for a term which was to expire at Michaelmas, 1870. On the 19th of March, 1870, the Defendant called on the Plaintiff, and a conversation took place between them, in the course of which the Defendant stated that *Ashmount* was not large enough for his family; upon which the Plaintiff suggested that another house, called *Cronstadt House*, also belonging to the Plaintiff, might suit. Both parties then went and inspected *Cronstadt House*; and, according to the allegations in the bill, a verbal agreement was come to between them, whereby the Plaintiff agreed to put the house into proper tenantable repair; and the Defendant agreed, upon this being done, to take the same at the yearly rent of £120 for the term of seven years computed from Michaelmas, 1870, determinable by the executors of the Defendant at six months' notice, in the event of the death of the Defendant during the term.

During the interview the Defendant, at the request of *the [192 Plaintiff, wrote and delivered to the Plaintiff the following letter :—

"*Ashmount, Abbey Wood*, 19th March; 1870.

"My dear Sir, — After our conversation this evening upon my exchange of residence, I agree to take *Cronstadt House* for the term of seven years on lease, subject to the condition of terminating at six months in the event of my death, at the rent of £120 per annum, on its being put into proper and tenantable repair.

"Yours faithfully,

"*R. Nesham*, Esq. *Thomas Selby.*"

It was admitted that this letter of itself was insufficient to satisfy the statute, and it was proposed, on the part of the Plaintiff, to supply the defect by a letter, written by the Defendant to the Plaintiff on the 20th of March, 1870, of which the material part was as follows :—

"With reference to my note to you of last evening, which was so hastily entered upon and penned in your presence, with the suggested alteration made by your wish, I think it best, to prevent the possibility of any misunderstanding arising between us, to say that it is clearly understood on my part that you agree, on my taking a lease of *Cronstadt House* for seven years from Michaelmas next, at £120 per annum, to put it, with the out-buildings, fencing, palings, gates, &c., attached thereto, in all proper and tenantable repair as shall be approved by my own surveyors, Messrs. *Wigg & Pownell*, of 7, *Bedford Row*. I also conclude that I shall have all the accommodations that I now have here, such as a bath-room, which, if you prefer, can be taken from the house I am now occupying, with the pipes, leading, &c. ; and as I did not go over the grounds, I conclude that there are the usual outdoor offices — such as coach-house, harness-room, stabling with loose box as I have here, tool-house, and conservatory heated with hot-water pipes ; that the gardens will be made perfect with plants and shrubs of the same quality and description as I have just planted at *Ashmount*, or those now recently planted should be taken up and planted afresh at *Cronstadt House ;* that the same quality of gravel from *Dartford* shall be laid on the garden walks, or taken from the walks at

Ashmount; that I may be also permitted to remove all fruit trees, dung, &c., at Michaelmas, 1870, that have been planted and 193] brought *on the premises during the past week; and that the kitchener which has been undergoing repair last week by having a new boiler, &c., put in, shall be removed and placed at *Cronstadt House;* and it must be clearly understood that the drainage must be made perfect, as I understand from several of my neighbors that it has long been in a very imperfect state, and the house is also represented to be exceedingly damp. I merely state what I am told since I saw you. In consequence of this I should wish the covenant that you purpose inserting in the lease as to the lease being terminated at the expiration of six months in the event of my death, shall also extend to any illness of myself or family occasioned by defective drainage. . . . Subject to these conditions I am prepared to ratify what I offered you, though some of my neighbors state the rent is much too high."

On the 21st of March the Plaintiff replied to the Defendant as follows:—

"I have to acknowledge the receipt of your letter, from which it is evident to me that you have been prejudiced. In order to set your mind at rest on the point, and to show you that I intend to act liberally to you, I enclose specification drawn up by my surveyor, Mr. *Davenport*, and from this you will at once see that the house will be put into good repair, and, in fact, all done that you could reasonably ask of me. With regard to the shrubs, I will allow you to replant all the shrubs at *Cronstadt House* planted since Christmas at *Ashmount*, and the garden shall be put into order. I shall feel much obliged if you can, without serious inconvenience, take *Cronstadt House* at Midsummer Day, when I will have it quite ready for you. I have seen Mr. *Davenport* to let, if possible, *Ashmount* by Midsummer or Michaelmas next. Please return specification when you have read same."

The Defendant returned the specification, and on or about the 5th of April, 1870, finally refused to take a lease on the terms alleged by the Plaintiff to have been agreed upon; and afterwards the bill in this suit was filed.

Mr. *Southgate*, Q.C., and Mr. *Dauney*, for the Plaintiff:—

The letter on the 19th of March does not clearly show when the term was to commence; but we can supply the defect from the *letter of the 20th of March. The effect of that letter [194 may be shortly stated thus: "I admit that last night I entered into an agreement for a lease to commence at Michaelmas, 1870; but now I ask for something more." A letter may be used to supply a term in an agreement, although it is written for the purpose of repudiating the whole agreement: *Bailey* v. *Sweeting* (1). In *Verlander* v. *Codd* (2) a person by letter agreed to grant an extension of a lease, and by a subsequent letter fixed the time when the term so proposed to be extended was to expire; and it was held that the letters constituted a sufficient memorandum to satisfy the *Statute of Frauds*. In *Warner* v. *Willington* (3) the letter containing the terms of the agreement sought to be enforced did not state the name of the lessor; but it was held that the defect might be supplied by means of another letter, in which the name was mentioned.

Mr. *Fry*, Q.C., and Mr. *Chitty*, for the Defendant, were not called upon.

Lord Romilly, M.R. —

I do not think that anything can be made of this case. I think it was merely negotiation between the parties. The first letter taken alone seems to me not to be one upon which specific performance of any promise could be enforced. It is very short, "after our conversation this evening upon my change of residence" — that is, there was a conversation between them upon the exchange of residence — "I agree to take *Cronstadt House* for the term of seven years on lease, subject to the condition of terminating at six months in the event of my death, at the rent of £120 per annum, on its being put into proper and tenantable repair." To take it from when? From the day on which this letter was signed? It is quite clear you must go to something else in order to have it explained what is the time which is referred to, that is, when the seven years begin to run. Then it is proposed to supply that omission from the subsequent letter.

(1) 9 C. B. (N. S.), 843. (2) T. & R., 352. (3) 3 Drew, 523.

I admit that you may make out a contract from a number of letters taken together; and if the Plaintiff agrees in them to enter into a definite contract that contract will be enforced by
195] this Court. You may get part of the *contract from one letter, and supply the period of its commencement from another letter, but you cannot do that and at the same time repudiate those parts of the other letter in which the person making the proposition introduces a number of other terms. He may say, "I am willing to take the lease from Michaelmas, but at the same time I understand that the repairs are to be determined by my surveyor; that there is to be a warm bath; that there is to be a gravel of a particular quality; and that there are to be plants of a particular sort." If the lessor acts upon that, and takes the commencement of the lease from Michaelmas, he must take the other stipulations suggested by the lessee. The lessor, in other words, cannot take as much of the letter as suits his purpose and reject the rest. Here the lessor answers to that, "With reference to putting it into proper repair, it is not to be decided by your surveyors but by my surveyors; as to the plants, I will allow you to put in those you have planted since Christmas." In fact all this was only negotiation between the parties; and if a bill for specific performance is filed, it must be filed upon the enforcement of a promise contained in both letters, on which the Defendant would be entitled to have all that he stipulated for in the second letter; but that is not what the Plaintiff seeks. Then, while the matter is still in negotiation, the Defendant, not later than a few days afterwards, in the first week of April, says, "I will have nothing at all to do with it." Thereupon the bill is filed for specific performance. Courts of equity have frequently been blamed for the manner in which in many cases a mere correspondence between the parties has been converted into a contract contrary, it is said, to their intention. In this case the Plaintiff appears to me to be in this dilemma: either the letter of the 19th of March constitutes the whole of the contract, in which case it is too vague for a Court of Equity to carry it into execution, or it is contained in the two letters of the 19th and the 20th of March; and then that is not the contract which the Plaintiff seeks to enforce; on the contrary, the plaintiff seeks to have something taken out of it.

I am of opinion that upon this case specific performance cannot be enforced, and that the bill must be dismissed with costs.

Solicitors: Messrs. *Pearson & Lee;* Messrs. *Aldridge & Thorn.*

M.R. Dec. 16, 1871; Jan. 15, 1872.

*Else v. Else. [196

[Law Reports, 13 Equity Cases, 196.]

[1868 E 54.]

Vendor and Purchaser — Sale by Court of Chancery — Conditions of Sale — Condition not to Object to Title prior to Document chosen as root of Title — Prior Title bad — Specific Performance.

A sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as root of title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for commencement of title. The purchaser inquired into the prior title, and refused to complete on the ground that the prior title was bad; and the Court being of opinion that such objection was well founded:—

Held, that, the sale being by the Court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase.

Whether a similar decision would be given in the case of an ordinary sale, *quære.*

Hannah Crookes, by her will, dated the 16th of April, 1823, devised certain real estate to trustees upon trust to let the same, and to apply the rents, issues, and profits in the maintenance and education of *William Richards* until he should attain his age of twenty-one years; and when he should have attained that age, upon trust to assign, and the testatrix thereby gave and devised the same to *Thomas Richards* and the said *William Richards*, their heirs and assigns, for ever, equally to be divided between them, share and share alike, as tenants in common; but should one of them happen to die before he arrived at the age of twenty-one years, leaving no child or children behind him lawfully begotten, then she gave, devised, and bequeathed the same unto the survivor of them, his heirs and assigns, for ever; and if it should so happen that both the said *Thomas*

Richards and *William Richards* should die leaving no lawful child or children behind them, then, and in such case, she gave, devised, and bequeathed the same estate to her five nephews therein mentioned. The testatrix died shortly after the date of her will.

Thomas Richards died under twenty-one without leaving any 197] *children. *William Richards* attained twenty-one, and in 1838 sold the property devised to him by *Hannah Crookes* to *Charles Else*, and conveyed the same to him by indentures of lease and release of the 23d and 24th of July, 1838, in the latter of which deeds the will of *Hannah Crookes* was recited down to, but not including, the ultimate gift over. *William Richards* was still living and childless.

Charles Else died in December, 1864, and this suit was instituted for the administration of his real and personal estate. An order was made in the suit for the sale of his real estate, including the property purchased by him in 1838.

The title to such property was in due course referred to the late Mr. *Hayes*, as conveyancing counsel, who investigated the same, and was of opinion that the ultimate gift over took effect only in the event of *William Richards* dying under twenty-one without leaving children, and consequently that a good title could be made thereto by persons claiming under *Charles Else*. The property was put up for sale in lots under conditions which were settled by Mr. *Hayes*, and provided (condition 8) that the abstract should commence with indentures of lease and release dated 23d and 24th of July, 1838, being a conveyance on a sale; (condition 9) that the purchasers should accept such commencement as a good substantive root of title, and not make any objection or requisition in respect of any prior title, or evidence of prior title, notwithstanding any recital or notice, or other disclosure of any such prior title; and (condition 15) that the purchaser should accept all recitals and statements in every abstracted deed, will, or other document dated twenty years or more prior to the day of sale as sufficient and conclusive evidence of the instruments, facts, matters, and things recited.

The purchaser of one of the lots, having ascertained the facts as to the prior title, refused to complete; and the question whether he was to be compelled to do so came before the Court on an adjourned summons.

The *Solicitor-General* (Mr. *Jessel*, Q.C.), and Mr. *Begg*, for the Plaintiffs in the suit:—

The gift over in the will of *Hannah Crookes* takes effect only in *the event of *William Richards* dying under twenty- [198 one; for there is an express direction to convey to *William Richards* at twenty-one; and, moreover, the true construction is so settled by authority: *Kirkpatrick* v. *Kilpatrick* (1); *Wheable* v. *Withers* (2).

But the conditions of sale preclude the purchaser from raising the objection. We admit that, even under these conditions, the Court would not force an absolutely bad title on a purchaser; but the effect of these conditions is to throw on the purchaser the burden of showing affirmatively that the prior title is bad, and that, in the face of the authorities cited, we submit that he cannot do.

Mr. *Joshua Williams*, Q.C., for the purchaser:—

The purchaser ought not to be precluded by the conditions from objecting to the title. This is a sale by the Court, and at such sales purchases are made on the supposition that everything will be fairly disclosed. Now the conditions disclose nothing; and even the abstract furnished did not disclose the objection, for the recital of the will of *Hannah Crookes*, contained in the deed which is made the root of title, stops short just at the critical point. It will be a great blow to fair dealing if the Court forces a bad title on a purchaser under such circumstances.

Then, as to the title itself, it is said that the will of *Hannah Crookes* contains a direction to convey to *William Richards* at twenty-one; but the word used is to "assign," which means simply to put him in possession. The legal effect of the will was to vest an estate in *William Richards* at once, subject only to the interest and power of the trustees during his minority: *Boraston's Case* (3); then there is a good executory gift over in the event of *William Richards* dying without leaving children: *Doe Ewart* (4); and the event on which the gift over is to take effect is not confined to death under twenty-one, but extends to the whole period of the life of *William Richards*: *Edwards* v.

(1) 13 Ves., 476.
(2) 16 Sim., 505.
(3) 3 Rep., 21, a.
(4) 7 A. & E., 636.

Edwards (1); *Cotton* v. *Cotton* (2). The gift over is likely to take effect, and to take effect soon.

The *Solicitor-General*, in reply.

199] *Jan. 15. LORD ROMILLY, M.R. :—

This case raises a question of great importance as regards the conduct and practice of the Court of Chancery. It may be that its duties sometimes conflict; and this case seems at first sight to raise a question of that description. But in reality no such conflict can ever arise if the principle on which the Court proceeds be steadily borne in mind, viz., the principle of truth, and the avoidance of all deceit, or even the semblance of a trick. The case arises, thus :—

It is the duty of the Court of Chancery, on certain occasions, to sell the real property of its suitors. It is, of course, the duty of any person or any Court which takes upon itself that duty to sell the thing entrusted to it in the most advantageous manner. For this purpose conveyancers are attached to the Court of Chancery, whose duty it is, amongst other things, to prepare conditions of sale, subject to which the property is offered for sale, and to make them such as will effect its object, and conduce to producing the highest price; but in so doing they must not insert anything which may mislead or deceive an innocent *bonâ fide* purchaser. That question arises in this case in the event of the Court being of opinion that a good title cannot be shown. The consequence is that two questions are presented to the Court.

The first question is whether the purchaser is bound by the 8th and 9th conditions of sale, under which he bought; and the second question is whether, if he is not so bound, he has got a good title to the property sold to him. I think the first questiod presented to me is so intimately connected with the second, that it depends so much upon it, that it will be more convenient, in the way I regard this case, to consider, first the validity of the objection to the title, on the assumption that no condition

(1) 15 Beav., 357. (2) 23 L. J. (Ch), 489.

of sale affects the question, and then to consider whether the conditions of sale preclude the purchaser from taking the objection.

The objection to the title depends upon the proper construction to be put on the will of a lady called Mrs. *Crookes*.

[His Lordship then stated the will, and continued:—]

The facts are these: *Thomas* died under twenty-one, without issue. *William Richards* attained twenty-one, and is now living, but is of an advanced age, and has no children. He was the predecessor *in title of the vendor, and claimed to be [200 owner in fee simple of the property, on the ground that the gift over on the contingency of his dying without leaving a child is limited to that event occurring during his infancy, and that, on his attaining twenty-one, he became entitled to an indefeasible estate in fee simple in the property.

I regret to say that full consideration of the words of the will, and of all the authorities which relate to the subject, compels me to come to the conclusion that the event of dying without leaving a child is not, in this will, confined to infancy, and that so to confine it would be to impart a meaning, and to add words to the will, neither of which can be found there. I am of opinion that the contingency of dying, having no child, here spoken of, means at any time, whenever that death may occur.

I think it useless to go through the authorities on this point which I have done on previous occasions — the more so as my decision on this case will bind no one, and could neither give to the vendor any title not now possessed by him, nor take away from him any right now vested in him. But I am bound to say that, having carefully reconsidered this question, which I have had before me on many previous occasions, I have come to the conclusion that the death of *William Richards*, without having a child, is not confined to that event occurring during his infancy. Having arrived at that conclusion, the next question arises, viz., whether it is open to the purchaser to take this objection. The conditions are these:— [His Lordship read them.]

The indenture of release of the 24th of July, 1838, recites the will of Mrs. *Crookes*, but the recital is inaccurate, for it stops short at the gift over. I am of opinion that these conditions of sale are not such as a Court of Equity can enforce on a purchaser. They amount to a condition, in fact, to the effect that

if you find you have not got the property, and cannot keep it, you shall not object. Practically this is a condition saying, that although you imagine you have been sold the fee, still, though you find that you have only bought an estate for the life of a man advanced in years, you must keep the property and pay the price, because you have been foolish enough to buy subject to such conditions of sale. The argument is, that you have shut
201] your eyes, and have got the property * at a reduced price (which is probably true); and you therefore have run the risk of being ultimately ejected against the reduction of price. I do not mean to express any opinion as to how the Court would look at this question if it arose between two strangers.

A buyer, no doubt, knows that unusual conditions of sale are framed to meet peculiar difficulties; and these are quite fair, even where framed by the Court, if they will still, in the opinion of the Court, leave the purchaser in the complete possession of the thing he has bought, even though he does not get what is called a marketable title; but if not, the Court has no right to enter into such contests, and try to fence with and outwit purchasers, and sell on the chance of the purchaser being able to resist a suit for the recovery of the possession of the lands on a defect not disclosed to him. I am of opinion that such a condition would be bad as a fraudulent misleading condition in any sale, for it professes, or induces the buyer to believe, that the recital accurately represents the will, which it does not. But in a sale under the authority of the Court of Chancery, which, above all things, ought to teach others, and set them the example of straightforward dealing, and telling the truth, and the whole truth, such a condition under the circumstances of this case, is, in my opinion, binding on no one. No good title being shown, and the purchaser not being bound by the conditions of sale to accept a bad one, he must be discharged from his purchase, and have his costs of the whole proceedings.

Solicitors: Mr. *J. Elliott Fox*; Messrs. *Le Riche & Son.*

M.R. Dec. 5, 1871; Jan. 11, 1872.

*Rennie v. Morris. [203

[Law Reports, 13 Equity Cases, 203.]

[1868 R. 154.]

Custom of Stock Exchange — Transfer of Shares — Infant Transferee — Liability of Jobber.

A jobber or dealer in shares on the *Stock Exchange* contracted to purchase the Plaintiff's shares in a company, and gave in to the Plaintiff's brokers a ticket with the name of the intended transferee, which had been passed on to him. After the execution of the transfer it was discovered that the transferee was an infant, of which neither party was previously aware; and the Plaintiff became liable for calls. In a suit by the Plaintiff against the jobber, seeking to make him liable to indemnify him in respect of the shares :—

Held, that, as by the usage of the *Stock Exchange* the jobber was, in the absence of fraud, discharged from liability when he had given the name of the transferee and paid for the shares, and as he had given all the further information required by the vendor, the suit against him could not be sustained.

The Plaintiff, *George Rennie*, was, at the time of the transactions in question, the owner and registered holder of certain shares in *Overend, Gurney, & Co., Limited.* The Defendant, *William Morris*, was a member of the *Stock Exchange*, and a dealer and jobber in shares. The object of the suit was to make the Defendant liable in respect of thirty shares in the said company sold and transferred by the Plaintiff, but to the calls on which the Plaintiff remained liable by reason of the Defendant, who contracted for the purchase, having given the name of an infant as transferee.

On the 14th of May, 1866 (four days after the company had stopped payment), the Plaintiff's brokers offered the shares for sale in the market, and the Defendant agreed to purchase them at 5*s.* a share, and on the same day handed in a ticket, according to the usage of the *Stock Exchange*, with the name of *Robert Graham* as the intended transferee. The Plaintiff executed the transfer of the shares into the name of *Robert Graham*, and on the 21st of May the Plaintiff's brokers handed to the Defendant the transfer and share certificates, and made no objection to the name of the transferee. Neither party was aware till long afterwards that *Graham* was an infant.

The Defendant's name was never registered, and the Plaintiff's name remained on the list of shareholders.

204] *It appeared that, according to the established usage of the *Stock Exchange*, which was followed in the present case, a jobber or dealer in shares bought in the market, not for himself but for the purpose of re-sale, and was deemed to have fulfilled his contract with the broker of whom he purchased it, on the day preceding the settling day, called the "name-day," he furnished to the broker a ticket with the name or names of the person or persons who had contracted to purchase, and pay the price for which the same were bought, or some other marketable price, the difference (if any) being made up by the jobber. It further appeared that the ticket so handed in to the vendor's broker often passed through several hands, from the ultimate transferee, or his broker to the jobber with whom the contract was made. Evidence was also given by the deputy chairman of the committee of the *Stock Exchange* of a further usage (referred to in the judgment), by which ten days were allowed by the rules of the *Stock Exchange* before the transfer was completed to enable the vendor or his broker to satisfy himself that the proposed transferee was a responsible person.

In June, 1866, a resolution was passed for the voluntary winding-up of the company, and on the 3d of July, 1866, an order was made to continue the voluntary winding-up under the supervision of the Court. Soon afterwards the Plaintiff was settled on the list of contributories in respect of the said shares, and paid the calls that were made thereon.

In December, 1866, the Plaintiff having discovered that *Graham* was an infant, applied to the Defendant for information respecting the person who gave in his name. He referred the Plaintiff to Messrs. *Bentley & Hall*, who were the next intermediate jobbers; and it appeared that they purchased for Messrs. *Wolfenden & Gell*, of the *Manchester Stock Exchange*, who, on being applied to, said that they purchased for Mr. *Lancashire* on the *Manchester Stock Exchange*, and that he refused to give the name of his principal.

The Plaintiff filed his bill, alleging that the Defendant must be treated as the principal in the contract so entered into by him as aforesaid, and praying that the agreement for the purchase of the shares should be specifically performed; and that the

Defendant might be decreed to pay to the Plaintiff the amounts which had *been paid or might be paid by him in respect [205 of calls, and to indemnify the Plaintiff from all future liability in respect thereof.

The Defendant, by his answer, denied his liability.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the Plaintiff:—

The contract having been made with the Defendant for the sale of the shares, which is undisputed, the Plaintiff is entitled to call upon him to complete it, as he has failed to give in the name of a responsible purchaser. He might have elected to take the shares himself, but instead of that he gave in the name of an infant as transferee. He cannot discharge himself of his liability unless he can show some usage of the *Stock Exchange* which clearly exonerates him. This, we submit, he has failed to do. Where the substituted purchaser is unable to contract, then the original contracting party remains liable.

The usage of the *Stock Exchange* in such cases was fully considered in the case of *Grissell* v. *Bristowe* (1), where it was held that the final buyers of shares were at liberty to transfer the contract to any sufficient buyer who would take them, and would then be released from liability; but that case is no authority for exonerating a jobber when he has given the name of an infant as transferee.

Here the vendor has become liable for calls, for which he is entitled to be indemnified by the jobber. The same principle was recognized in *Hawkins* v. *Maltby* (2); *Castellan* v. *Hobson* (3); *Hogkinson* v. *Kelly* (4); and *Maxted* v. *Morris* (5).

Sir *R. Baggallay*, Q.C., Mr. *Macnamara*, and Mr. *Higgins*, for the Defendant;—

This case is governed by the authority of *Maxted* v. *Paine* (second action) (6), where the majority of the Court held that a jobber who had purchased shares had fulfilled his obligation by passing in a name to which no objection was taken within the time limited by the usage of the *Stock Exchange*, and that in

(1) Law Rep., 4 C. P., 36.
(2) Ibid., 6 Eq., 505; Ibid., 4 Ch., 200.
(3) Law Rep., 10 Eq., 47.
(4) Ibid., 6 Eq., 496.
(5) 21 L. T. (N. S.), 535.
(6) Law Rep., 6 Ex., 132.

206] the absence of fraud *he could not be treated as an ultimate buyer for himself or be made liable for calls.

That decision is directly applicable to the present case. There may be many intermediate purchasers between the jobber and the ultimate purchaser, and the jobber cannot be held liable for not inquiring into the responsibility of the person whose name is given him to hand in. There are ten days allowed by the rules of the *Stock Exchange* for the vendor to make inquiries. After that time the liability of the jobber is at an end. It does not, however, follow that the ultimate purchaser is not liable, but we contend that by the custom of the *Stock Exchange*, as well as upon principles and authority, the present suit cannot be sustained.

Mr. *Southgate*, in reply :—

The case of *Maxted* v. *Paine* (1), relied on by the Defendant's counsel, is not an authority in their favor, as the facts were different, the transferee there being a person capable of contracting. There is no usage of the *Stock Exchange* which affects the Plaintiff's right to indemnify, and his remedy is not barred by lapse of time.

1872.

Jan. 11. Lord Romilly, M.R., after stating the facts of the case, continued :—

There is no doubt that the Defendant acted *bonâ fide ;* nor is any charge of fraud or collusion alleged against him. He bought and sold according to the established usage of the *Stock Exchange.* According to that usage, by which all members and all persons employing members of the said *Stock Exchange* for the purpose of buying and selling shares are bound, a jobber or dealer does not buy shares for his own account or for the purpose of taking a transfer of the same to himself, but for a resale, and is held to have fulfilled his contract with the broker from whom he buys if, on a day preceding the settling day on which the contract is to be completed, and called the " name-day, he furnishes to such broker the name or names of a certain

(1) Law Rep., 6 Ex., 132.

person or certain persons, who will receive a transfer or transfers of the shares which he *contracted to purchase, and pay [207 the price for which the same were bought, or some other marketable price for the said shares, the difference being made up by the jobber. According to the said usage a broker, who has purchased shares for a particular settling day, issues on the preceding name-day to the jobber from whom he purchased a ticket bearing his own name and address, and the name and address of the person or persons to whom the shares bought by him were to be transferred, with the price at which they were bought. Such jobber on the same day passes on this ticket to any jobber from whom he may have purchased as many of the shares in the same company for the same day; and it so passes from hand to hand until it is delivered by the jobber who has purchased so many shares from a broker to that broker. The last-mentioned broker then fills up a transfer in a printed form, inserting the name of his principal as transferor, and the name so given to him as transferee, and the price specified on the ticket as the consideration money for the transfer; and his principal having executed the transfer, he, on or within a reasonable time after the settling day, delivers it to the broker whose ticket was so passed, together with the share certificates, and receives from him the price specified on the ticket. If the price payable by the transferee should be less than the price at which the shares were originally sold, the difference between these prices would be paid to, or settled in account with, the broker of the transferor by the jobber to whom he sold.

There is also a practice on the *Stock Exchange* which it is desirable to refer to in order to show that it was not resorted to here, which is thus described in the evidence: "According to the said usage, and by the rules of the said *Stock Exchange*, ten days are allowed to the seller, that is the transferor, of registered shares for their delivery, during which time he can make inquiry as to the *bonâ fides* of the transaction, and the status of the intended transferee of the shares whose name may have been handed to him in manner hereinbefore described. The jobber or other middle-man has no opportunity for making such inquiry, as immediately he receives the name he must pass it on. In the absence of any special bargain for indemnity, it is the duty of the seller, for his own protection, to inquire into and

208] ascertain the *bonâ fides* of the transaction *and status of such transferee before accepting him and handing transfers of the shares to him. If the broker wishes to secure the registration of the shares, he makes a special bargain with the jobber in express terms to that effect, known as 'guarantee of registration;' but in that case the price offered by the jobber is often very considerably below the ordinary market price."

It remains to apply the usage of the *Stock Exchange* (which, where it does not contravene any of the existing laws of this realm, is the law of this Court in these cases) to the facts which occurred in this case.

[His Lordship then stated the facts in detail, and continued:—]

This, I think, makes the matter, and the course to be pursued by a vendor of shares in such circumstances as the present, quite clear.

Shares are sold by the Plaintiff to the Defendant without any guaranteed registration. The purchaser turns out to be an infant. The seller, through his broker, applies to the jobber who bought from his broker, and the jobber who bought refers to the broker who bought from him. The broker, when so applied to, either gives up the name of his principal, that is, the person who instructed him to buy, or he refuses so to do. If he gives up the name of the person from whom he received such instructions, that person is the person liable to make good the loss to the vendor, and the brokers on both sides and all the intermediate jobbers (assuming always an absence of fraud) are perfectly exempt from all liability, and cannot be touched — assuming, of course, that they give all the information in their power. If the broker refuses to give the name of his principal, or all the requisite information in his power, then a bill in Chancery is necessary to compel this disclosure from him; and the costs of this proceeding would fall upon the person withholding the information. To apply that to the present case, the application is first properly made to the Defendant, who refers them to Messrs. *Bentley & Hall.* Here the case is complicated by the circumstance that they bought for brokers on the *Manchester Stock Exchange*, viz., Messrs. *Wolfenden & Gell.* Thereupon Messrs. *Wolfenden & Gell* are applied to, and they give all the information in their power; they say that they

*bought for Mr. *Lancashire*, a broker of the *Manchester* [209 *Stock Exchange*, and that he refuses to give up the name of his principal. Here the Plaintiff stops, but clearly erroneously; he ought to have applied to Mr. *Lancashire*, and if Mr. *Lancashire* had refused to give up the principal, he should have instituted this suit against him to compel him to disclose the real purchaser, or if not to take the consequences upon himself as the real purchaser, and to make good the Plaintiff's losses, and also indemnify him against future payments. But in no case, in my opinion, is any one of the intermediate purchasers who tell all they know liable to the Plaintiff. Were a different course to be adopted, and were this Court to make the person who entered into the immediate contract liable, it is clear that the matter would give rise to as many suits as there were jobbers in the transaction; and so in every *Stock Exchange* transaction every jobber would be liable to his vendor *toties quoties*, until at last you got to the original broker, and from him to the person who employed him.

The usage of the *Stock Exchange* very properly obviates this necessity: and as it is clear that the person who is the real purchaser, and gave the first instructions, would be ultimately liable, it puts an end to the multiplicity of suits brought to make each person liable to his vendor. Such a course would be wholly opposed to the real principles of equity, which aims at shortening litigation; and, on the same principle, the custom jumps over the heads of the innocent persons, and makes the real delinquent the person primarily and exclusively liable.

I am also of opinion that all the cases that bear on this subject support this view of the case, and that the Defendant can in no respect be made liable for the loss sustained by the Plaintiff, from the circumstance that Mr. *Lancashire*, either for himself or for some client, thought fit to buy thirty *Overend, Gurney, & Co.*, shares in the name of a boy incapable of entering into a contract. If I am right, this suit is misconceived; it is addressed against the wrong Defendant, and it must be dismissed with costs.

Solicitors for the Plaintiff: Messrs. *Parker & Clarke.*
Solicitor for the Defendant: Mr. *J. Tucker.*

V.-C.B. Nov. 8, 1871.

243] *Ward v. Wolverhampton Waterworks Company.

[Law Reports, 13 Equity Cases, 243.]

[1871 W. 169.]

Option of Purchase — When exerciseable.

An agreement (sanctioned by Act of Parliament) was entered into between two water companies, by which it was agreed that company *A.* should take over the works, provide for a mortgage debt, and pay interest upon the shares of company *B.* This agreement was sanctioned by Act of Parliament, and the transaction was carried into effect by an indenture of January, 1857, which provided that if company *A.* (or their intended assignees, the Corporation or Local Board of Health), being desirous of becoming the absolute and unrestricted owners of the works of company *B.*, subject only to the mortgage debt, should, "on or before any 25th of December, after having given to company *B.* six months' previous notice of their desire to avail themselves of the option thereby given, pay unto company *B.*" £46,246, the amount of their share capital, the party so paying should become absolutely entitled to the works.

In June, 1870, the corporation who had acquired the interest of company *A.*, gave notice to company *B.* of their intention to pay the £46,246, on the 25th of December following, but they were unable, from want of funds, to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th of December, 1871 :—

Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January, 1857, of purchasing, after six months' notice, on or before any 25th day of December.

Demurrer.

From the statements of the bill, which was filed by the Plaintiff on behalf of himself and all other the shareholders in the *Wolverhampton Waterworks Company*, except the Defendants thereto, it appeared that the *Wolverhampton Waterworks Company* (the old company) were incorporated by Act of Parliament in 1845, with a capital of £26,000, divided into 2600 shares of £10 each; it being provided that, after half the original capital should have been paid up, it should be lawful for the company to borrow on mortgage to the extent of £8000. By an Act passed in 1850 further powers were given to the old company for extending their works and raising additional capital.

By the *Wolverhampton New Waterworks Act*, 1855, the new company were incorporated, with a capital of £100,000; and it

*was thereby enacted that it should be lawful for the new [244 company, and they should be bound and obliged, if thereunto required by the Corporation of *Wolverhampton*, to sell and transfer to the corporation the whole of their undertaking, and the lands, waterworks, and property, on such terms and conditions as should be mutually agreed on, and in case of any difference, should be settled by arbitration under the *Lands Clauses Act*; and thereupon the property of the new company should vest in the corporation, and all contracts made with the new company should thenceforth be valid in favor of or against the corporation.

On the 14th of February, 1856, an agreement was executed between the old company and the new company, by which, after reciting that £44,980 was the amount on the 3d of April, 1855, of the share capital of the old company, and that £17,300 was the amount of the borrowed capital or mortgage debt of the old company, it was agreed that in the event of the agreement being confirmed by Parliament, the old company should make, and the new company accept, a grant in perpetuity of the works of the old company, under a rent which should be equal to interest at 5 per cent (or in the event therein mentioned, at 4½ per cent), on the £44,980, and a further sum accrued in addition thereto since the 3d of April, 1855, up to the date of the agreement, making in all £46,246. In case the new company should sell the works to the Corporation or Local Board of Health for *Wolverhampton*, the rent should be a rent equal to interest at 5 per cent, on the aforesaid share capital of the old company after such sale; and the new company was to pay all interest upon the mortgage debt of the old company, and to indemnify the old company against payment of the capital of the mortgage debt. It was also agreed that the grant should contain a provision enabling the new company, or in the event of a sale to the Corporation or Local Board of Health, then the corporation or local board, or their assigns, on or before the end of any year, by the payment by them to the old company of a sum equal to the share capital of the old company, to entitle the new company or the parties making such payment as aforesaid, to the works and premises comprised in such grant, subject to the mortgage debt of £17,300.

By the *Wolverhampton Waterworks Transfer Act*, 1856, this

245] *agreement was confirmed, and the companies were authorized to execute an indenture for the purpose of more effectually carrying out the transfer.

Accordingly, by an indenture dated the first of January, 1857, between the old company and the new company, the old company granted all their works and generally the whole undertaking of the old company unto the new company and their successors in perpetuity upon the terms stated in the agreement of the 14th of February, 1856. It was also thereby declared and agreed that if the new company, or in the event of a sale to the said Corporation or the Local Board of Health of *Wolverhampton* as aforesaid, then, if the said Corporation or Local Board of Health, "being desirous of becoming the absolute and unrestricted owners of the works and premises thereinbefore expressed to be thereby granted, subject only to the said debenture debt of £17,300 and interest, should, on or before any 25th of December, after having given to the old company six calendar months' previous notice of their desire to avail themselves of the option thereby given, pay unto the old company the sum of £46,246, the new company, or the party making such payment, should thereupon become entitled to the said works and premises, subject to the said debenture debt of £17,300 and interest, but freed and discharged as from the day of such payment, if the same should be made on any 25th of December, or if on any other day as from the 25th of December next succeeding such day of payment, from the rents thereby reserved, and from all other the covenants on the part of the new company, and other the stipulations and provisions in restriction of their absolute ownership in the now stating indenture contained, save and except the covenants and provisions for the indemnity of the old company against the said debenture debt of £17,300; and that, on payment in manner aforesaid of such sum as aforesaid, the old company should, at the expense of the new company, do all such acts and things as might be necessary for carrying into complete effect that provision."

By indenture of the 24th of June, 1869, the new company transferred their undertaking to the Corporation of *Wolverhampton*, in pursuance of the *Wolverhampton Waterworks Transfer Act*, 1867.

246] *On the 18th of June, 1870, the corporation, in pursu-

ance of their parliamentary powers, gave notice to the old company that, on the 25th of December, 1870, they would avail themselves of the option given to them by the indenture of the 1st of January, 1857, and would pay the sum of £46,246, being the amount of the old company's share capital. The corporation were unable, however, from want of funds, to act upon the notice given by them in June, 1870, but applied for an extension of the time for payment off of the amount. The company declined to extend the time for payment of the share capital, stating that they considered any right of purchase the corporation might have had was at an end. On the 15th of June, 1871, the corporation served a second notice, that, being desirous of becoming the absolute and unrestricted owners of the works granted by the old company to the new company, subject only to the old company's debenture debt of £17,300 and interest, they, the corporation, would avail themselves of the option given by the indenture of the 1st of January, 1857, and would pay to the old company the sum of £46,246, being the amount of their share capital.

The bill stated that since the receipt of this last notice, and in pursuance thereof, the corporation had been making the necessary arrangements for the absolute purchase of the waterworks, and for the payment off of the share capital of the old company, on the 25th of December, 1871; and that, if such purchase were completed, it would be to the prejudice of the Plaintiff and the other shareholders in the old company. The Plaintiff submitted that the right of purchase given to the corporation by the indenture of the 1st of January, 1857, was demined by their default in payment of the £46,246 on the 25th of December, 1870, pursuant to their notice of June, 1870; and that any sale to the corporation by Defendants in pursuance of the notice of the 15th of June, 1871, would be invalid.

Under these circumstances, the bill prayed a declaration that the right of purchase given to the corporation by the indenture of the first of January, 1857, of the works and premises thereby granted was now determined, and that the notice of the 15th of June, 1871, was of no effect. The bill also prayed an injunction to restrain Defendants, the old company, from selling or transferring *to the corporation the works and premises com- [247
prised in the indenture of the 1st of January, 1857.

To this bill the Defendants demurred.

Mr. *Kay*, Q.C., and Mr. *Jolliffe*, in support of the demurrer:—

The corporation, by failing to pay off the share capital at the time specified in their first notice, have not for ever lost their right. No doubt where there is a provision that the vendor may re-purchase, it has been held that the time limited for that purpose ought to be precisely observed: *Barrell* v. *Sabine* (1); and that the party claiming the right to re-purchase is bound to give a regular notice, and also bound to pay according to that notice: *Joy* v. *Birch* (2); *Lord Ranelagh* v. *Melton* (3). But those cases are distinguished, as this is not one of re-purchase between vendor and purchaser, so as to render time of the essence of the contract. It is rather like the right of redemption in a mortgagor, which may be exercised at any time, or a power of appointment, which is not necessarily destroyed by a previous ineffectual and illegal attempt to exercise it: *Topham* v. *Duke of Portland* (4). Moreover, the terms of the agreement, "on or before any 25th of December, after having given to the old company six calendar months' previous notice," &c., show conclusively that time was not made of the essence of the contract. The payment may be made at any time during any year, and the six months' notice is only introduced for the convenience of the old company, as in the case of a mortgagee. It cannot, therefore, be held that by failing to pay at the expiration of the first six months' notice, the corporation have lost the benefit of the condition entirely: *Pegg* v. *Wisden* (5).

Mr. *Fry*, Q.C., and Mr. *F. T. Procter*, in support of the bill:—

We agree that this provision as to six months' notice was introduced for the convenience of the old company shareholders; but no possible advantage can result to them if this notice is to be kept hanging over their heads *de anno in annum*. The clause in question is not a power of redemption, which only occurs 248] when the *relation of lender and borrower exists, but an option to re-purchase, limited to be void upon the non-performance of a certain condition; the test of the question, whether

(1) 1 Vern., 268.
(2) 4 Cl. & F., 57.
(3) 2 Dr. & Sm., 278.
(4) Law Rep., 5 Ch., 40.
(5) 16 Beav., 239.

the contract was in its nature a mortgage under the form of a sale or a *bonâ fide* purchase, subject to a contract for re-purchase, being the reciprocity and mutuality of the remedies: *Fisher* on Mortgages (1). In conditions of re-purchase or pre-emption, time has always been held to be of the essence, and as the terms of the notice of June, 1870, have not been complied with, the condition is gone: *Davis* v. *Thomas* (2); *Brooke* v. *Garrod* (3).

Mr. *Kay*, in reply.

Sir James Bacon, V.C.:—

The question which I have to determine is one of the narrowest kind, as it depends entirely upon the construction of the deed of 1857. There is no doubt that in the case of a sale of property, where a right of re-purchase is reserved, terms may be imposed upon the exercise of that right, the non-performance of which will deprive the person entitled to it of any benefit from such exercise. *Brooke* v. *Garrod*, which was referred to, was an instance of the like kind, where a right of pre-emption was lost by the non-performance of terms imposed by a testator's will. But that principle does not affect the present case. The transaction, which is stated clearly in the bill, was of the following nature: There was an old company consisting of shareholders, which had incurred a mortgage debt of £17,300, and was possessed of works and other property. An agreement was entered into for the transfer of this property to the new company upon certain terms. The new company contracted to take the property and to pay the mortgage debt, and also to pay interest upon the shares of the old company at the rate of 5 per cent., with a proviso for the reduction in certain events of the rate of interest to 4½ per cent. This agreement was quite consistent with the circumstances of the case. The shareholders of the old company were to cease to have any connection with the works, and they were to be protected from all loss. The *agreement was objected to by no shareholder, and they [249 had no cause whatever of complaint. An Act of Parliament was passed to ratify the agreement, and the whole transaction was carried into effect by the deed of the 1st of January, 1857, which contains the following clause:—[His Honor referred to

(1) Pages 13, 14. (2) 1 Russ. & My., 506. (3) 2 De G. & J., 62.

the clause giving the option to purchase, set out in the statement.]

How can I insert into that clause a proviso, that if six months notice be given and failure is made in payment at the expiration of the notice, the right of purchase is destroyed? I cannot make any such insertion. The deed of 1857 must be construed by the light of the agreement of 1856 and the Act of 1856, which are recited in it; and reading them together, the construction of the deed is clear. I should, however, be sorry to decide this question upon the effect of words, if I thought the words were inconsistent with the intention of the parties. But I cannot say that the words were inconsistent with the intention. I can see no hardship to the shareholders in the continued existence of this power of paying off the share capital. The same power exists of paying off those who hold stock in the public funds; but that power does not create any difficulty in the sale of the stock. The case made by the bill does not go beyond a vague allegation that the transaction will prejudice the Plaintiff; but I cannot see that anything will happen which was not contemplated in the agreement; and I am of opinion that the argument from inconvenience has no place in the present case. There was no ground for the institution of the suit, and the demurrer must be allowed with costs.

Solicitors: Messrs. *Sharp & Ulithorne*; Messrs. *Bower & Cotton*.

V.-C.B. Nov. 24, 1871.

250] *PALMER v. FLOWER.

[Law Reports, 18 Equity Cases, 250.]

[1870 P. 89,]

Will — Legacy — Failure of Purpose of Legacy — Gift Valid — Special Case — Practice.

Testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favor of his nieces, their husbands, and children. He then declared that "for making a further provision for the

maintenance of" his above-mentioned nephew, it should be lawful for his trustees, during the life of his sister-in-law upon her request in writing, to expend any sums not exceeding £6500 in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army.

After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid £600 for the exchange, and £550 for horses and outfit; after which, in May, 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the £6500, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son.

From and after the 1st of November, 1871, purchase of commissions in the army was by royal warrant abolished:—

Held, that the nephew was entitled to the full sum of £6500, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty.

Since the filing of a special case affecting property to which certain infant Defendants were entitled, another child in the same interest had been born.

The Court, at the hearing, dispensed with the presence of the newly-born child.

SPECIAL CASE. *Charles James Palmer*, who died on the 3d of January, 1868, by his will dated the 22d of November, 1867, after appointing executors, bequeathed the residue of his mixed real and personal estate upon trust to pay the income to his sister-in-law, *Elizabeth Palmer* during her widowhood; and after the determination of such trust, upon trust in case his nephew, *William Henry France Palmer*, should be then living, to appropriate or purchase a sufficient sum of consols to procure an income of £104 per annum, to be paid to *W. H. F. Palmer* during his life, or until his bankruptcy, composition with his creditors, or alienation thereof; and the testator declared that if the last-mentioned trust should determine *in the [251 lifetime of *W. H. F. Palmer*, the trustees should in their discretion pay the said income without anticipation for or towards the maintenance and support of *W. H. F. Palmer*. The testator declared that, subject to the discretionary trust aforesaid, the capital fund so to be appropriated should form part of his residuary estate.

The testator then disposed of his residuary estate specifically, as to one moiety, in favor of his niece *Frances Eliza Pitt*, her husband and children; as to the other moiety in favor of his niece *Augusta Mehetabel Cook*, her husband and children; and as to either or both moieties, in default of children and of appointment by will by either niece respectively or both the nieces, in trust for the children of his sister *Eliza Celia Clarkson* living at his death.

Testator then continued:—

"Provided always, and I declare, that for making a further provision for the advancement of my said nephew, *W. H. F. Palmer*, and notwithstanding the trusts and provisions in favor of my said sister-in-law, *Elizabeth Palmer*, and of my said nieces and their respective husbands and children, it shall be lawful for my said trustees or trustee, during the life of the said *Elizabeth Palmer*, upon her request in writing, and after her death, at the discretion of the trustees or trustee, from time to time to expend any sum or sums of money out of my residuary estate, so that the aggregate amount so expended do not exceed the sum of £6500, in the purchase of any commission or commissions for, or in obtaining the promotion of, the said *W. H. F. Palmer* in her Majesty's army; and I declare and direct that every sum of money so expended shall, as to one-third part thereof, be taken from the part of my residuary estate hereinbefore referred to or distinguished as "the first moiety," and as to the other two-third parts thereof be taken from the half part of my residuary estate hereinbefore referred to or distinguished as "the second moiety."

At the testator's death *W. H. F. Palmer* was a lieutenant in the 68th Regiment of Infantry. He afterwards exchanged into the 14th Hussars, and for this purpose, on the 15th of February, 1868, paid £600 for the exchange and £550 for horses and outfit.

On the 30th of May, 1868, Mrs. *Palmer* signed and sent to the 252] *trustees a written request that they would pay to her son *W. H. F. Palmer*, out of the testator's residuary estate, the whole of the £6500, with interest at £4 per cent. from the date of the request, or, at all events, the sum, free from legacy duty, of £630, paid by him in effecting the exchange, and also the sums "either already or to be hereafter expended" by him in purchasing horses and providing his outfit, with interest as aforesaid.

The trustees declined to make any payment without the sanction of the Court.

The case was filed in July, 1870, by *W. H. F. Palmer* and Mrs. *Palmer*, as Plaintiffs, against the executors and trustees, and the persons beneficially interested under the will; the Plaintiffs submitting that the Plaintiff *W. H. F. Palmer* was

entitled to be paid out of the testator's residuary estate the whole of the £6500 and interest at 4 per cent. from the date of the request; or, if not, that he was entitled to be paid out of the residuary estate, free of legacy duty, £1150 (being the £600 and £550) with interest at 4 per cent.

The case alleged that the Defendants, other than the trustees, submitted whether the sum of £1150 and interest should be paid to the Plaintiff *W. H. F. Palmer*, but insisted that he was not as yet absolutely entitled to any other part of the £6500 and interest.

The questions were, 1, whether the Plaintiff *W. H. F. Palmer* was entitled to the whole of the £6500; or 2, to the £600; or 3, to the £550; 4, if to any sum, whether also to interest; 5, whether subject to legacy duty; and 6, as to the costs of the case.

After the filing of the case, by royal warrant dated the 20th of July, 1871, followed by the *Regulation of the Forces Act*, 1871 (34 & 35 Vict. c. 86), passed on the 17th of August, 1871, purchase in the army was abolished from and after the first of November, 1871.

Since the case was set down a child of one of the nieces had been born.

Mr. *Kay*, Q.C., and Mr. *Kingdon*, for the Plaintiff:—

Although the purpose of the legacy has failed, in consequence of the abolition by royal warrant of the system of pur- [253 chase in the army, the gift is nevertheless good to the full extent of the £6500 and interest from the date of the request.

"Where a legacy is given to a person to answer a particular purpose, to which it becomes impossible to appropriate it, but from no fault in the legatee, he will be entitled to the money; as in instances of a sum of money being left for the benefit of an infant as an apprentice fee, and he is never placed in the situation or character of an apprentice; or where a legacy is given to a person to assist him in defraying the expenses necessary to procure priest's orders, and he becomes a lunatic — in each case the legacy will vest at the testator's death, and upon this principle: it is considered that the property was intended for the legatee at all events, and that the mode directed for its application was merely a secondary consideration, and inde-

pendent of the gift:" *Roper* on Legacies (1), referring to *Barton* v. *Cooke* (2), and two other cases. This passage is cited with approval by Lord *Romilly*, M.R., in *Cowper* v. *Mantell* (3).

In *Leche* v. *Lord Kilmorey* (4) the legacy was left for the purpose (as here) of purchasing promotion in the army of the legatee, and he was held entitled, though compelled from illness to leave the army.

In *Robinson* v. *Cleator* (5), where there was a gift of the income of a fund upon trust to apply the income to the maintenance of a legatee until twenty-one; and afterwards a direction to pay the whole dividends to him for life; and the trustees were empowered, before he should attain twenty-six, to raise a sum not exceeding £600 "towards or in order to" his preferment or advancement in life; upon a claim by the legatee, on attaining twenty-one, to the whole fund, Lord *Thurlow* directed an inquiry as to the circumstances and situation of the claimant.

In this instance the discretion of the trustees was not to be exercised during Mrs. *Palmer's* life, so that the case is far within *Cope* v. *Wilmot* (6), commented on by the Lord Chancellor, when Vice-Chancellor *Wood*, in *In re Sanderson's Trusts* (7),

254] *[As to the practice in the event of a child having been born since the setting down of the case they cited, *In re Brown* (8) and *Morgan's* Chancery Acts and Orders (9).]

Mr. *Wilcock*, Q.C., and Mr. *Dickins*, for the trustees.

Mr. *S. H. Boult*, for the residuary legatees:—

The rule laid down in *Roper* is an exception to a more general and leading rule — that, the purpose of a gift failing, the gift must fail likewise. The ground for the exception, which is that a legatee is not to be deprived, by an accident beyond his control, or, by no fault of his, of a provision made for his benefit, does not apply here, where a separate provision is made by the will for the Plaintiff after Mrs. *Palmer's* death. The question is, whether it is consistent with the testator's intention that

(1) 4th Ed., page 646.
(2) 5 Ves., 461.
(3) 22 Beav., 231, 233.
(4) T. & R., 207.
(5) 15 Ves., 526–7.
(6) 1 Coll., 396, n.
(7) 3 K. & J., 497, 505.
(8) 29 Beav., 401.
(9) 4th Ed., pp. 118 (*b*), 210 (*d*).

his nieces and their families should be deprived of this sum for the benefit of a nephew, who cannot now use this money for the purpose for which it was expressly given to him by the testator.

At least the Court will not declare him entitled to more than his actual outlay, incurred before purchase in the army was abolished.

SIR JAMES BACON, V.C. :—

I think the questions in this case must be answered in favor of the Plaintiff, Mr. *Palmer*.

The sole judge constituted by the testator as to the propriety of raising this sum is the co-Plaintiff, Mrs. *Palmer ;* and she by a letter, has in the most formal and direct manner expressed her wish to the trustees that the whole of this sum shall be raised out of the residuary estate, and paid.

It is, no doubt, true, as has been observed, that an application of the sum to the purpose specified in the will is no longer possible; but this circumstance does not result from any act or default of the legatee.

The testator has explained his intention to be to make a further "provision for the advancement of" his nephew; and that intention is not to be defeated on the ground that the advancement can *no longer be made in the way proposed. It is [255 quite possible that the legatee may obtain promotion in the army by other means, without any direct pecuniary outlay for that purpose.

Mr. *Kay* said that he could not contend against the liability to pay legacy duty.

A declaration was made to the effect that the Plaintiff *W. H. F. Palmer* was absolutely entitled to the £6500, subject to the payment of legacy duty, with interest at 4 per cent. from the 30th of May, 1868; the costs of all parties as between solicitor and client to come out of the residue; the Court dispensing with the presence of the newly-born child.

Solicitors for the Plaintiffs, and some of the Defendants: Messrs. *Palmer. Palmer, & Bull.*

Solicitor for the Trustees: Mr. *J. B. Marsden.*

V.-C.B., Jan. 18, 1872.

261] *LYCETT v. STAFFORD AND UTTOXETER RAILWAY COMPANY.

[Law Reports, 13 Equity Cases, 261.]

[1870 L. 8.]

Railway Company — Unpaid Vendor — Lien — Injunction.

The Court will not, for the purpose of enforcing the lien of an unpaid vendor against a railway company for his purchase and compensation money, interest, and costs, restrain the company from running trains or engines over the land until the sale (directed by the order) of the land agreed to be taken.

Earl St. Germains v. *Crystal Palace Railway Company* (1) not followed.

THIS was an application on behalf of Plaintiff, an unpaid landowner, for the purpose of enforcing the lien in respect of purchase and compensation money, interest, and costs to which he had been declared entitled by the decree made on the 23d of June, 1871, that the land agreed to be taken by the company, and of which they were in possession, might be sold, and that the company might be restrained from running trains or engines over the land until the sale.

In June, 1865, the company entered into an agreement to take, for the purposes of their undertaking, land belonging to the Plaintiff, and in August, 1865, they entered into possession. In August, 1866, it was arranged that the purchase should stand over on payment by the company of interest. Since March, 1867, the payment of interest had ceased, and the purchase-money remained unpaid.

In January, 1870, Plaintiff filed his bill for specific performance and consequential relief, and on the 23d of June, 1871, he obtained a decree for, 1, specific performance; 2, an account of what was due to Plaintiff, with interest from the 26th of March, 1867, and payment by the company within three months from the date of the certificate, on payment of the amount Plaintiff to execute a proper conveyance to the company, and the company to pay Plaintiff's taxed costs of suit; 3, declaration that Plaintiff was entitled to a lien upon the land in respect

(1) Law Rep., 11 Eq., 568.

of the purchase-money, with *interest thereon at 5 per [262 cent. from the 28th of March, 1867, as also for his taxed costs; 4, in case of default Plaintiff to be entitled to apply to the Court to enforce such lien.

On the 22d of July, 1861, the Chief Clerk had certified that £813 5*s.* 8*d.* was due to Plaintiff for purchase-money, or compensation, and £172 1*s.* 11*d.* for interest. By the Taxing Master's certificate of the 21st of December, 1871, £104 6*s.* 11*d.* was found to be the amount of Plaintiff's taxed costs.

The amounts certified to be due not having been paid by the company, the Plaintiff now moved for a sale and an injunction for the purpose of enforcing his lien.

The company did not appear.

Mr. *Fischer*, for the applicant, referred to *Earl St. Germains* v. *Crystal Palace Railway Company* (1), where an unpaid vendor was held entitled, upon petition, to have the amount certified to be due to him for principal, interest, and costs raised by a sale of the lands, and in the meantime to an injunction restraining the company from continuing in possession of the lands, and a receiver. In *Munns* v. *Isle of Wight Railway Company* (2) Lord Justice *Giffard* discharged an order of the Vice-Chancellor *James* for an injunction restraining the company, until payment, from running any engine over, or otherwise using or continuing in possession of, the land (3); but it was submitted that the Court would not refuse to give effect to Plaintiff's lien by restraining them from running trains, which was no more than restraining them from continuing in possession of the land.

The VICE-CHANCELLOR, following the decision of Lord Justice *Giffard* in *Munns* v. *Isle of Wight Railway Company*, made an order for a sale of the land, Plaintiff to be at liberty to bid at such sale; and declined to grant an injunction.

Solicitors: Messrs. *White & Sons.*

(1) Law Rep., 11 Eq., 568. (2) Law Rep., 5 Ch., 414.
(3) Law Rep., 8 Eq., 653.

V.-C.B., Jan. 23, 1872.

263] *MILLER v. MILLER.

[Law Reports, 13 Equity Cases, 263.]

[1870 M. 231.]

Tenant for Life and Remainderman — Open Brick-field — Devise for Sale at Discretion of Trustees — Royalties.

A testator, having purchased a piece of land, opened it as a brick-field, and it was open at his death. By his will he devised it to trustees upon trust to sell "when, in their discretion, it may seem advisable;" and he directed that the rents "and profits," should, until sale, be considered as part of his personal estate, and be applicable and applied in such manner as the dividends or interest to arise from the investments of the sale moneys. He then gave the income of the investments to a tenant for life, with remainder, as to the capital, over.

Royalties became payable after the testator's death. The trustees did not sell for ten years, but allowed the brick-field to be worked out, being of opinion that by holding the land for the present they might sell it at a higher price afterwards for building purposes:—

Held, that the tenant for life was entitled to the royalties absolutely, and not merely to the income which they would have produced, if invested.

SPECIAL CASE. In or about 1859 *William Bellingham*, having purchased in fee, for the sum of £1150, a field at *Portsea*, in the county of *Hants*, opened the same as a brick-field, and let it to a Mr. *Foster* at no fixed rent, but reserving a loyalty for every 1000 bricks made.

On the 24th of July, 1860, *William Bellingham* made his will, whereby he devised his residuary real estate, including the brick-field, to *George Curtis* the younger and *Thomas Bartlett*, their heirs and assigns, upon trust to sell the same "when, in their discretion, it may seem advisable;" and he directed that the estates directed to be sold and the rents and profits thereof should, until sale thereof, be taken and considered as part of his personal estate, and be applicable and applied in such manner and for such intents and purposes as the dividends or interest of the money to arise from such sale would be payable or applicable under his will, in case such a sale had actually taken place and the purchase-money been paid and invested before his decease. The testator then directed his trustees to invest the proceeds of the sale of his real estate and his residuary per-

sonal estate in Government, or real, or long leasehold, securities *in *England*; and he declared trusts of such investments; [264 the first trust being to pay an annuity to his wife; and as to the residue of his estate, upon trust to pay the income thereof to his daughter *Tamar Ann*, the wife of *Benjamin Miller*, for her separate use, without power of anticipation; and after the decease of his said daughter, then as to the principal and future income, in trust for her issue as she should by will appoint; and in default of such appointment, in trust for the child, if only one, and for all the children, if more than one, of his said daughter, such interest or interests to vest, as to children born before his decease, at thirty, or on their dying under that age leaving issue; and as to children born after his decease, at twenty-one, or on their dying under that age leaving issue, with accruer amongst the children as to non-vested shares; and if no child should acquire a vested interest, in trust for such persons or purposes and in such manner as his daughter, being discovert, should by deed to be duly executed, or, being covert, should by her will appoint; and in default of appointment, in trust for the children of testator's sister, *Ann Bettesworth*, in equal shares as tenants in common.

The testator died on the 5th of September, 1861. His daughter, Mrs. *Miller*, now had two children, infants; and his sister Mrs. *Bettesworth*, had two children.

The case which was filed by Mrs. *Miller*, by her next friend, as Plaintiff, against her two infant children and one of Mrs. *Bettesworth's* children (the residence of the other being unknown), and the trustees, *Curtis* and *Bartlett*, stated the above facts, and also that after the decease of the testator Mr. *Foster* still carried on his business of brickmaking on the brick-field, and finally used up all the brick earth, and the brick-field was in consequence given up by him, and the same was then let to a Mr. *Dawson*, a market gardener, at the rent of £22 10*s.* per annum, being the same rent that was paid for the field before Mr. *Foster* entered into possession.

The case then stated that at the testator's death the sum of £300, or thereabouts, was due from Mr. *Foster* on account of royalty, which sum had been paid; that Mr. *Foster* had also paid to the trustees for royalties the further sum of £551 1*s.* 8*d.*, and that he owed to them for royalties the further sum of £83 4*s.*

8*d.*; also that the brick-field had not been sold under the trusts 265] of the will, the *trustees being of opinion that by retaining the same in their hands for the present, and selling it at some future time as building land, a greater price would be obtained.

The case then alleged that the trustees, under the circumstances above stated, considered that Mrs. *Miller* was entitled, if not to the whole of the royalty paid to them, at all events to a portion of the same; and had accordingly at different times made advances to her of portions of the royalty; but had not considered themselves justified in paying to her the whole without first obtaining the opinion of the Court.

The questions were:—

1. Whether all, or if not all, any, and if any, what portion of the said royalties becoming payable after the testator's decease should be paid to the Plaintiff, the said *Tamar Ann Miller*, as tenant for life under the trusts of the will above stated?

2. Or whether all or any, and if any, what portion of the royalties so becoming payable should be invested as capital trust property?

3. As to the costs of the suit?

Mr. *C. Hall*, for the Plaintiff:—

Irrespectively of the will, the tenant for life would be entitled to these sums, as to all other profits of the estate, absolutely.

But by the express terms of the will, the rents and "profits" of the estates, until sale, are made applicable in such manner as "the dividends or interest of" the investments of the sale moneys; *i.e.*, they are payable to the tenant for life.

The trustees have vested in them an express discretion with regard to the time of sale, and they have exercised that discretion by deferring the sale for a reason which they give, namely, that the property will probably improve in value as building land.

The right of the tenant for life is made clearer by the circumstances that the brick-field was opened by the testator himself, and was opened at his death, so that the well-known rule relating to open mines applies: *Viner* v. *Vaughan* (1); *Daly* v. *Beckett* (2).

Upon the argument arising out of the terms of the will, viz., that the rents and profits are to go as the income of the per-

(1) 2 Beav., 466. (2) 24 Beav., 114.

sonal estate *goes, analogous cases occur with regard to [266 long annuities and interests, which, from their nature, are not allowed to be retained as between tenant for life and remainderman, where there is a trust for conversion; and the question is, what is to be done with the income until conversion? In such cases the tenant for life has been held entitled to the intermediate income: *Sparling* v. *Parker* (1); *Wrey* v. *Smith* (2); *Mackie* v. *Mackie* (3).

Mr. *H. C. Ward*, for the infant Defendants:—

The tenant for life is entitled only to the income which these sums would have produced had they been invested.

The case is not governed by the authorities that have been cited. Here there is a discretionary power of sale. In *Viner* v. *Vaughan* (4) there was no trust for sale until after the death of the tenant for life. In *Daly* v. *Beckett* (5) there was no direction or trust for conversion at all, but merely a power of leasing.

The decision of this case must depend upon what was the duty of the trustees; and the rights of the parties will be declared by the Court as if the trustees had exercised their discretion when they were bound to do so, viz., at a proper time, and before the property was exhausted. As to this the rules are very plain. If the sums had been sums paid for royalties arising out of an existing mine, they might have come under the designation of "profits." But the case here is, that the testator dying in 1861, the trustees have allowed the estate to be wasted to the extent of £630 in about ten years, so that it now yields only £22 10*s.* a year. The discretion of trustees must be exercised equitably or the Court will interfere.

In *Sparling* v. *Parker* Lord *Langdale*, M.R., expressly says (6): "I do not find any point made here that this is perishable or wearing-out property," which completely distinguishes the case. His Lordship further says (7): "It is very true that a trustee, having a discretion to exercise according to the best of his judgment, would not be allowed to exercise it in such a capricious *manner as to be injurious to any party." The conduct of [267 these trustees has certainly been injurious to the remaindermen.

(1) 9 Beav., 524.
(2) 14 Sim., 202.
(3) 24 Beav., 114.
(4) 5 Hare, 70.
(5) 2 Beav., 466.
(6) 9 Beav., 527.
(7) 9 Beav., 528.

In *Wrey* v. *Smith* (1) the trust was to convert "with all convenient speed," and the question turned solely upon the construction of the word "convenient" (2).

Authorities in favor of the Defendant's contention are: *Walker* v. *Shore* (3); *Wilkinson* v. *Duncan* (4); and the observations of the Master of the Rolls in *Yates* v. *Yates* (5).

Mr. *Casson*, for the trustees.

Sir James Bacon, V.C., after stating the question, and observing that the reason why the sale was not effected — namely, that the trustees were of opinion that, by retaining the land in their hands for the present, and selling it at some future time as building land, "a greater price would be obtained"— formed part of the case, continued:—

The general law upon the subject is very well understood.

The facts in this case are, that the testator, having purchased a piece of land, and opened it as a brickfield, in respect of which some royalties had been received, and others were then due, makes his will, whereby he devises his residuary real estate, including this brick-field, to trustees and their heirs, upon trust to sell the same "when in their discretion it may seem advisable;" and directs that the "rents and profits" thereof shall, until sale, be "taken and considered as part of his personal estate, and be applicable and applied in such manner, and for such intents and purposes, as the dividends or interest" of the sale moneys, when invested, would be payable; and then gives a life estate in the investments to his daughter. She is entitled not only to the rents, but to the rents and "profits;" and I cannot disregard this word "profits," especially as the testator was in his lifetime deriving profits from this very property.

It is not denied that the tenant for life is entitled to the profits of the property, but it has been contended that it is not 268] competent *for the trustees, by a capricious exercise of their discretion, to prejudice the rights of the remaindermen. Now, if there had been, in my opinion, any capricious exercise of the trustees' powers, I should have listened to Mr. *Ward's*

(1) 14 Sim., 202.
(2) Ibid., 211.
(3) 19 Ves., 387.
(4) 23 Beav., 469.
(5) 28 Beav., 637, 641.

argument, who contends that the tenant for life is entitled only to the interest on these profits, as if the trustees had sold the property.

But it is plain upon the will that no sale can take place unless the trustees think fit; and that they may sell whenever they like.

Then it is said that, by not selling, they have given a benefit to the tenant for life. But by the general law a tenant for life has the right to the proceeds of an open brick-field, and that right can only be controlled by the exercise by the trustees of their discretion, to sell the land; and as to the due exercise by the trustees of their discretion, if the facts are correctly stated, nothing that has been done has diminished the interest of the persons in remainder.

The question must be answered to the effect that all the royalties becoming payable after the testator's decease belong to the Plaintiff as tenant for life.

The costs of all parties, as between solicitor and client, will come out of the fund.

Solicitor for all parties: Mr. *Fortune.*

V.-C.W. Nov. 22; Dec. 9, 1871.

Bourdin v. Greenwood.

[Law Reports, 13 Equity Cases, 281.]

[1870 B. 102.]

Promissory Note — Subsequent Indorsement by Maker of his Name and Date — Statute of Limitations — Lord Tenterden's Act — Acknowledgment of Debt.

L., in 1846, promised to pay, three months after date, to *B.* or to *C.*, his wife the sum of £500. *B.* died in 1863, leaving *C.* surviving. There was an indorsement on the note in *L.'s* handwriting of his name and the year 1866. *C.* died in 1868:—

Held, that it was not intended to make a new note, and that there was a sufficient acknowledgment to exclude the *Statute of Limitations.*

The Rev. *William Hawkes Langley* having, prior to 1846, borrowed several sums of money from *Dominic François Bourdin*, to

enable him to carry on certain literary pursuits by means of 282] *which he was struggling to maintain himself, gave, in in that year, a promissory note in the form following:—

"*Wheatly, Oxon.* January the sixth, 1846.

"Three months after date I promise to pay to *Dominic François Bourdin*, Esq., or to *Sarah Matilda Bourdin*, his wife, the sum of five hundred pounds for value received.

£500 0*s.* 0*d.* *William Hawkes Langley.*"

D. F. Bourdin, who died on the 30th day of October, 1863, by will dated the 25th day of July, 1856, appointed *S. M. Bourdin* his sole executrix, and she proved the will. In January, 1866, *S. M. Bourdin* represented to *W. H. Langley* that he ought to sign some document which would give her a legal claim notwithstanding the lapse of time. He proposed to her that he should sign the promissory note anew, and alter the date, and suggested that that would be sufficient acknowledgment to keep the debt alive. He altered the date of the promissory note from 1846 to 1866; signed the note on the back thus:—"*W. H. Langley*, 1866;" and handed it so signed to *S. M. Bourdin*.

S. M. Bourdin, who died on the 14th day of January, 1868, by will dated the 5th of June, 1865, appointed the Plaintiff, *François Hippolyte Bourdin*, her sole executor, and he proved the will. *W. H. Langley* was for many years in pecuniary difficulties, and incurred heavy expenses in litigation, in which he, after the death of Mr. and Mrs. *Bourdin*, established his title to some real estate of the value, as alleged, of £10,000 or £12,000.

W. H. Langley, who died on the 16th of February, 1870, by will in January, 1869, after bequeathing a legacy of £300 to *Henry Hansler*, in consideration of his advances to him of £300 or £350, gave the rest of his property, real and personal, to the Defendants, *Henry Greenwood* and *Phoebe Greenwood*, in certain shares, the share of *Phoebe Greenwood* to be divided equally among all her children living at her death, share and share alike. In February, 1870, administration with the will annexed of the estate and effects of *W. H. Langley*, was granted to the Defendant *Henry Greenwood*.

The Plaintiff prayed that the sum of £500 owing to the estate of *D. F. Bourdin* or *S. M. Bourdin*, together with such interest

thereon as the Court should think fit, might be paid to the Plaintiff *by a short day, or that in default the personal [283 and real estate of *W. H. Langley* might be administered under the direction of the Court, and that the real estate might be sold; for accounts and inquiries, and for a receiver.

Mr. *Karslake*, Q.C., and Mr. *E. Cutler*, for the Plaintiff:—

The original note was dated in January, 1846. There has been an alteration in the figures, but how, by whom, and under what circumstances it was made there is no evidence at all. It is not, however, material to fix the precise date of the alteration, as the debtor wrote his name and the figures "1866" on the back of the note; and that is a perfectly good acknowledgment. It was not necessary that the amount of the debt should be stated in the acknowledgment. This was not a commercial transaction, but a case of assistance rendered to a poor man. Though there is no case in the books where the signature of the debtor on the back of a note has been held to be an acknowledgment, yet, having regard to the alteration made and to the other circumstances, there is enough to relieve the Court from deciding that the Plaintiff has no claim because of the *Statute of Limitations*.

It is submitted that a fresh stamp was not necessary, but if it should be considered that it was necessary, the document can be stamped now.

[They referred to *Jones* v. *Ryder* (1); *Rendell* v. *Carpenter* (2); *Cheslyn* v. *Dalby* (3); *Blanckenhagen* v. *Blundell* (4); *Hart* v. *Prendergast* (5); *Dabbs* v. *Humphries* (6); *Darby & Bosanquet* on Statutes of Limitations (7); *Byles* on Bills (8); 9 Geo. 4, c. 14, s. 8 (Lord *Tenterden's Act*).]

Mr. *Hemings* (Mr. *Dickinson*, Q.C., with him), for the Defendant:—

If the signature and date 1866 constituted a promise to pay, the note was made a new one, and as such, it should have been restamped. That not having been done, the Defendants are

(1) 4 M. & W., 32.
(2) 2 Y. & J., 484.
(3) 4 Y. & C. Ex., 238.
(4) 2 B. & A., 417.
(5) 14 M. & W., 741.
(6) 10 Bing., 446.
(7) Chap. iv., p. 45, 49, *et seq.*
(8) 10th Ed., p. 347.

entitled to say that there is nothing to sustain this suit. If that 284] objection *should not be considered a sufficient defence, then it may be contended that there is no proof that the signature of the debtor on the back of the note was written in 1866; and that being so, there is nothing to take the case out of the *Statute of Limitations.*

[He cited *Holmes* v. *Jaques* (1), *Rackham* v. *Marriott* (2), and *Hamelin* v. *Bruck* (3).]

Mr. *Karslake*, in reply, referred to *Ex parte Yates* (4).

During the arguments some letters written by the parties were read and commented upon, but in the view of the Court they were not evidence.

Dec. 9. SIR JOHN WICKENS, V.C.:—

This is a creditor's suit, and the only question is whether the debt in respect of which the Plaintiff sues is barred by the *Statute of Limitations.* The Rev. *William Hawkes Langley* gave to *Dominic François Bourdin*, who had lent him money, a promissory note dated the 6th of January, 1846, by which he promised to pay to *Dominic François Bourdin* or to *Sarah Matilda Bourdin*, his wife, £500 at three months after date. *Dominic François Bourdin* died in 1863, and his wife *Sarah Matilda* became his executrix. She died in January, 1868, and the Plaintiff is her executor, and the derivative executor of *Dominic François Bourdin.* The Defendants are the administrator and the devisees of *Langley*, the debtor. Of course the debt is barred by the statute unless there has been something to exclude its operation. What is relied on by the Plaintiff for that purpose is an indorsement on the note in *Langley's* handwriting, which is as follows: "*W. H. Langley*, 1866." The production of the note with this indorsement upon it is the only evidence in support of the Plaintiff's case. Some letters in 1869 were relied on at the bar, but those not having been pleaded cannot operate as an acknow-

(1) Law Rep., 1 Q.B., 376.
(2) 1 H. & N., 234.
(3) 9 Q.B., 306.
(4) 2 De G. & J., 191.

ledgment for the present purpose; and it is therefore unnecessary to consider their effect.

*It is difficult, I think, to resist the inference that Mr. [285 *Langley* must have indorsed his name, and the date 1866, on the note for the purpose of acknowledging that the debt was then due: that he did it for some purpose is clear, and it is hardly possible to suggest any other. It must be taken that some time in the year 1866 Mrs. *Bourdin*, who was one of the alternative payees and the executrix of the other, produced the note to the maker, who then indorsed it, and wrote the year when he did so, and handed it back to her. If he had prefixed "Due," or any similar word, the matter would have been too clear for argument, since the paper itself identified the debt; and the question is, whether the want of the word makes any difference. I think that it does not on principle, and that it would be too narrow a construction of Lord *Tenderden's Act* to say that there is here no acknowledgment made or contained in a writing signed by the party chargeable. It is true that there is here no writing except the signature and the date, but if they together involve an acknowledgment, as I think they do, the want of any other writing can hardly be fatal. It should be mentioned that on the note itself the date 1846 was converted into 1866, and this alteration is pleaded by the Plaintiff as done by Mr. *Langley* at the time of the indorsement. There is no proof that it was so, though the thing seems not improbable. It was urged that that alteration disclosed an intention to make a new promissory note, and not to acknowledge an existing one, and that the case is one not of old note and acknowledgment, but of new note, bad for want of a stamp. Considering that the original signature is not cancelled; that the note is still left as an alternative promise to pay to two persons, one of whom was dead, and that the new signature is written on the back of and across the note, I think it the better conclusion that it was not really intended to make a new note in the strict sense of the word, but simply to acknowledge an existing one. The Plaintiff is, therefore, entitled to the usual decree.

Solicitors: Messrs. *Cutler & Turner*; Mr. *J. P. Poncione*, Jun.

See New York Code, § 110 and Cases cited in Voorhies' Code and also Wait's Code.

V.-C.W. Dec. 8, 21, 1871.

286] **In re* ROSS'S TRUSTS.

[Law Reports, 13 Equity Cases, 286.]

Statute of Distributions (22 & 23 *Car.* 2, *c.* 10)— *Grandchildren and Great-grandchildren — Division per Stirpes.*

A fund was devisible under the *Statute of Distributions* among grandchildren and great-grandchildren, claiming by two lines of descent from their common ancestor :—

Held, that the fund must be divided into moieties ; and each moiety subdivided between the respective descendants *per stirpes* and not *per capita.*

THIS was a Petition presented by *Margaret Mary Dumaresq Ross*, an infant (by her mother, as her next friend), the Rev. *Thomas Fletcher* and *Mary Dumaresq*, his wife, and *Percy Wheeler Child* and *Georgina Emily Howard*, his wife ; and it prayed (after providing for costs) that the residue of a sum of £9000 15*s.* 11*d.*, £3 per Cent. Consolidated Bank Annuities, in Court, to an account intituled "In the matter of the Trusts of the Will of *Alexander Ross*, deceased, the Share bequeathed to *Margaret Ross*, with remainders over," might be divided into two equal half parts ; that one-third of one of such equal half parts might be carried over to "the account of the Petitioner, *Margaret Mary Dumaresq Ross*, an infant under the age of twenty-one years ; that another third of one of such equal half parts might be transferred to the Petitioner, the Rev. *Thomas Fletcher*, in right of his wife ; that the remaining third of one of such equal half parts might be transferred to the Petitioner, *Percy Wheeler Child*, in right of his wife, and that the other of such equal half parts might be divided amongst, or applied for the benefit of, the several persons claiming (as hereinafter stated) under the testator's son, *William Francis Ross ;* or else that the trust fund might be divided between the Petitioners and the several other persons interested therein, in such shares and proportions as they were respectively entitled to.

Alexander Ross, by his will, dated the 17th of November, 1819, bequeathed certain specific articles to trustees, upon trust for his wife during widowhood, and after her decease or marriage, upon the trusts declared concerning the residue of his real and

personal estate. The testator then bequeathed a sum of £1500, *East India* *Stock, to his trustees for the benefit of his [287 wife during her widowhood; and directed that, on her decease or marriage, one moiety of it was to be held upon the trusts declared concerning the share of his daughter *Mary Ross* in his residuary estate; and the other moiety upon the trusts declared concerning the share of his daughter *Margaret Ross* in his residuary estate. He then bequeathed a sum of £2000 to his trustees to invest and hold the same upon trust in the event of *Margaret Ross* attaining twenty-one years, and thenceforth, until her marriage or death unmarried, to pay the produce of the fund to her and her assigns for her and their own benefit; and after her decease, upon the trusts declared concerning her share of his residuary estate. He then, after making certain pecuniary and specific bequests devised all his real, and bequeathed the residue of his personal, estate to his trustees, upon trusts for the sale, conversion, and investment thereof respectively; and directed his trustees to accumulate the annual proceeds thereof, at compound interest, for fourteen years from his decease. He then declared that "the trust moneys to arise or be produced under the residuary devise and bequest thereinbefore contained which should be so invested, and the accumulations which should be so made as aforesaid, and the stocks, funds, and securities in or upon which the said trust moneys and accumulations respectively should be invested, should, on the expiration of the said space of fourteen years, be divided into as many equal shares as the number of them, his three sons, *Alexander Ross*, *Thomas Ross*, and *William Francis Ross*, and his daughters *Mary Ross* and *Margaret Ross*, who should be then living, or should be then dead having left issue of his, her, or their body, or respective bodies then living; and one of the said shares should be respectively allotted to each of such children, and the share which should be so respectively allotted to each of his said sons who should be then living should be in trust for him absolutely, and be assigned and disposed of accordingly." The testator then provided for the event of either of his sons or daughters being dead at the time of allotment, leaving issue, and disposed of his daughters' shares as follows: "And the share which should be so allotted to each of his said daughters who should be then living should be held upon trust, during her respective

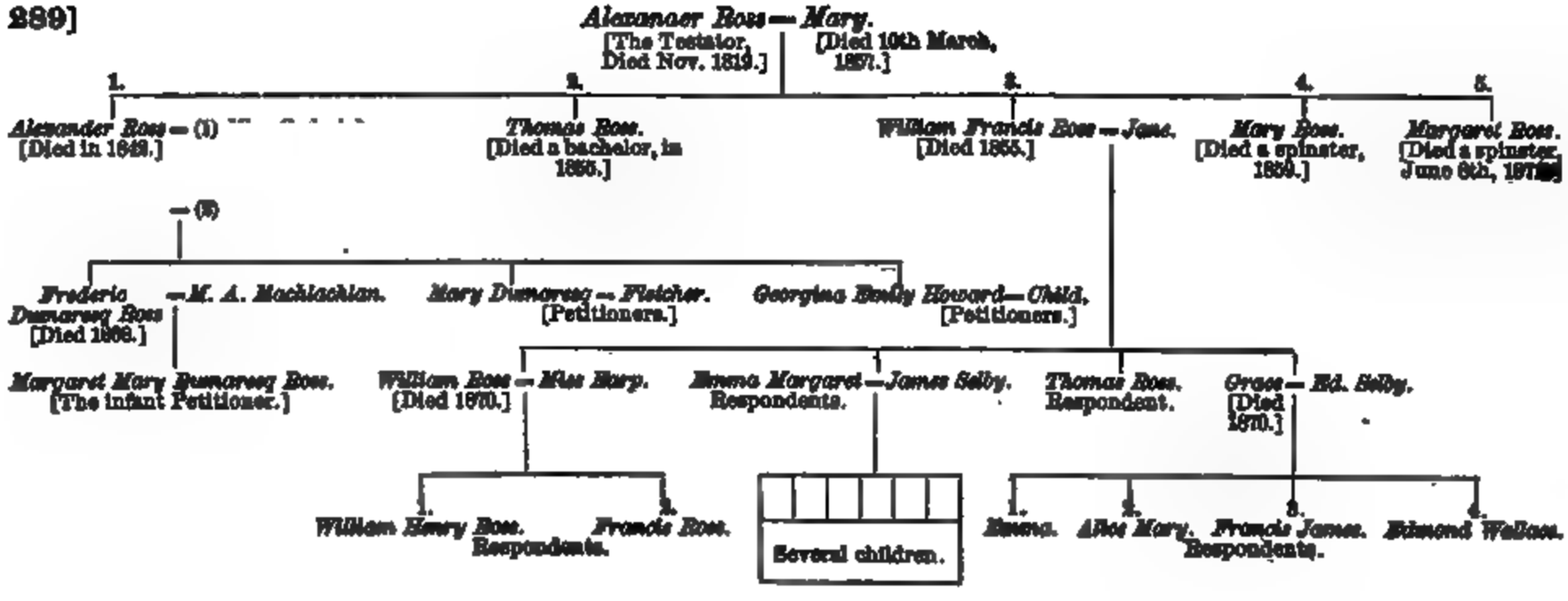
288] life, to pay and apply the annual produce *thereof in such or the like manner for her respective separate use, with such powers of appointment, and giving receipts as therein particularly mentioned; and after the decease of such respective daughter, the share so respectively allotted to her as aforesaid should respectively remain and be in trust for" (the children or child of such respective daughters as in the will particularly declared); "and if there should be no such child, then after the decease of such respective daughter, and such failure of her issue, the share so respectively allotted to her as aforesaid should go over and be in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case he" (the testator) "was then to die possessed thereof and intestate; and to be divided between or among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statutes." The testator appointed the trustees of his will his executors. He died on the 27th of November, 1819, and his will was duly proved (with a codicil) on the 15th of December following. He left the five children named in his will, and no more.

The residuary estate of the testator was duly converted by his trustees shortly after his death, and the produce thereof invested and accumulated for the period and in the manner mentioned in his will. At the end of that period the trust funds and accumulation were divided into five equal shares. Three were paid to *Alexander Ross*, the son, *Thomas Ross*, and *William Francis Ross* respectively; and the remaining two were invested by the trustees in their names in trust for *Mary Ross* and *Margaret Ross* respectively, and their respective children (if any). *Margaret Ross* died a spinster on the 8th of June, 1871.

At that time the share to which she was entitled for her life amounted (after certain deductions for trustees' costs payable thereout) to the aforesaid sum of £9000 15*s.* 11*d.* £3 per Cent. Consolidated Bank Annuities, which, in November, 1871, were duly transferred to the above stated account.

The state of the testator's family on the 8th of June, 1871, will appear from the following pedigree:—

289]


Alexander Ross — Mary.
[The Testator, Died Nov. 1819.]
[Died 10th March, 1857.]
1.
2.
3.
4.
5.
Alexander Ross — (1)
[Died in 1842.]
Thomas Ross.
[Died a bachelor, in 1855.]
William Francis Ross — Jane.
[Died 1855.]
Mary Ross.
[Died a spinster, 1859.]
Margaret Ross.
[Died a spinster, June 8th, 1871.]
— (2)
Frederic Dumaresq Ross
[Died 1868.]
— M. A. Machlachlan.
Mary Dumaresq — Fletcher.
[Petitioners.]
Georgina Emily Howard — Child.
[Petitioners.]
Margaret Mary Dumaresq Ross.
[The infant Petitioner.]
William Ross — Miss Harp.
[Died 1870.]
Emma Margaret — James Selby.
Respondents.
Thomas Ross.
Respondent.
Grace — Ed. Selby.
[Died 1870.]
1.
2.
William Henry Ross.
Respondents.
Francis Ross.
Several children.
1.
2.
3.
4.
Emma.
Alice Mary.
Francis James.
Respondents.
Edmond Wallace.

290] *The Petition dealt only with the share of *Margaret Ross*, which practically was now the whole of the testator's residuary estate. The question was, whether, inasmuch as the claimants were all children or grandchildren of *Alexander Ross*, the son, and *William Francis Ross*—*i. e.*, grandchildren or great-grandchildren of the testator — they took representatively and *per stirpes* under *Alexander Ross*, the son, and *William Francis Ross*, respectively or *per capita*?

Mr. *Greene*, Q.C., and Mr. *Millar*, for the Petitioners :—

According to the true construction of the *Statute of Distributions* (22 & 23 Car. 2, c. 10, ss. 3, 5, and 7), this fund must be divided into moieties, and each moiety subdivided among the descendants, 1, of *Alexander*, the one son, and, 2, of *William Francis*, the other son, of the testator. But as those descendants in each case consist now of both grandchildren and great-grandchildren of the testator — persons not all equally next of kin to him — they can only take as representatives of their respective parents and not in their own right as the next of kin—*i. e.*, they take *per stirpes* and not *per capita*: *Davers* v. *Dewes* (1); *Williams* on Executors (2); *Lloyd* v. *Tench* (3). Both *Burton's* Compendium of Real Property (4) and *Watkins* on Descents (5) clearly contracted *Toller* on Executors (6). The result is, that the Petitioners who claim under *Alexander*, the son, will each take one-third of their moiety.

Mr. *Bedwell*, for the Respondents *W. H. Ross*, *Francis Ross*, *James Selby*, and *Emma Margaret*, his wife, and *Thomas Ross*, great-grandchildren and grandchildren of the testator, claiming under *William Francis Ross* :—

This case is a mixed one, where persons are entitled both *per stirpes* and *per capita*. If the claimants had been all grandchildren only, or all great-grandchildren only, the division of the fund would have been *per capita*—because all the claimants 291] would *have been equally next of kin to the testator. The statute does not contemplate representation beyond "the

(1) 3 P. Wms. 49 (note D.).
(2) Vol. ii. Ed. 1867, pp. 1385–1386.
(3) 2 Ves. Sen. 213–216.
(4) 8th Ed. 1856, pp. 432–433 (note) 434, 435.
(5) Ed. 1837, p. 259.
(6) Ed. 1838, p. 374.

children of an intestate, and such persons as legally represent such children, in case any of the said children be then dead" (sects. 3 and 5). That is to say, it looks at the possible death of the children, and the succession of their immediate descendants only, viz., the grandchildren of the intestate. This fund, therefore, ought now to be divided into sevenths — because, at the statutory limit of representation, there were seven grandchildren of the testator, each one entitled, as equally his next of kin, to take *per capita*. But their children, the great-grandchildren of the testator, can only take their parent's share, by representation, *i.e.*, *per stirpes;* and the fund should be distributed accordingly. There is no reported case exactly like this one.

Mr. *Everitt*, for the Respondents, the other great-grandchildren claiming under *William Francis Ross*, supported the same view.

Mr. *Method*, for the trustees.

Mr. *Greene*, in reply:—

The statute alone is to be regarded in this case, and it only alludes to the next of kin in the 3d and 6th sections. In the latter it says that "in case there be no children, nor any legal representatives of them, then one moiety of the estate is to be allotted to the wife, and the residue distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them." That clearly shows that as long as there are lineal descendants the division must be *per stirpes*, and not *per capita;* and the distribution of the fund contended for by the Petitioner is the correct one.

Dec. 21. Sir John Wickens, V.C.:—

The question reserved for judgment in this case is one as to the operation of the *Statute of Distributions*, where the intestate left grandchildren and great-grandchildren, but no children.

Alexander Ross, by his will, dated the 17th of November, 1819,

292] *gave one-fifth of his residuary estate to his daughter *Margaret Ross* for life, with remainder to her children; and in default, "in trust for the person or persons who, under the statutes made for the distribution of the estates of intestates, would then be entitled thereto, in case I were then to die possessed thereof and intestate; and to be divided between and among such persons, if more than one, in the proportions in which the same would be divisible by virtue of the same statutes."

Margaret Ross died on the 8th of June, 1871, unmarried.

The testator died in November, 1819, leaving five children, of whom *Margaret* was the youngest.

Of these the second and fourth died before 1871 without issue. *Alexander*, the eldest son, had three children, of whom two survived him in June, 1871; and one died before June, 1871, leaving a daughter still living. *William Francis*, the third son of the testator, and the only one besides *Alexander*, who left descendants living in 1871, had four children, viz., *William*, who died in December, 1870, leaving two children now living, *Emma* and *Thomas*, who are both still living, and *Grace*, who died in January, 1870, leaving four children, now living.

Therefore, in June, 1871, there were two subsisting lines of the testator's descendants; the one springing from *Alexander Ross* the younger, and represented by two grandchildren of the testator and one great-grandchild, the only child of a deceased grandchild; the other springing from *William Francis Ross*, and represented by two grandchildren of the testator, two great-grandchildren springing from his dead grandchild *William*, and four great-grandchildren springing from his dead grandchild *Grace*. The question on the Petition is as to the shares in which *Alexander Ross's* estate is to be distributed among those persons.

It is singular that a question of this sort should be uncovered by judicial authority; but no case bearing on it was cited at the Bar, and I have been unable to find any.

The *Statute of Distributions* deals separately with the case of descendants, and that of next of kin not descendants. The case of children is provided for by the 5th section (which is referred to in the 3d), and the case of next of kin, not being descendants, by the 6th and 7th sections. The general effect of the pro-

visions is *that (supposing there to be no wife) the estate, [293 in case there are descendants, shall go between the children and their representatives; and in case there are no descendants, shall go amongst the next of kin or their representatives; and that the division is *per capita* where all the takers claim in their own right; and *per stirpes* where they, or some of them, claim as representatives of another person.

It has been long settled that the word "representatives" in this Act includes only "descendants."

It has been further settled that where all the persons entitled to claim are collaterals equally near of kin, for instance, second cousins twice removed, they take *per capita*, because they all take in their own right; but that where there are no ancestors or descendants, and the nearest of kin are brothers and sisters, but there are also children of dead brothers and sisters, the latter, though not of the next of kin, may claim as representatives of the brother or sister from whom they spring, and may stand in the place of that brother or sister for the purpose of distribution; so that the distribution is *per stirpes*. This privilege is expressly limited by the statute, and does not extend to any more remote descendants of brothers and sisters than their children, and does not apply at all to any case where the next of kin are all more remote than brothers and sisters.

There are, therefore, two cases provided for by the statute, viz., 1, where there are children, or the representatives—*i. e.*, the descendants—of children; 2, where there are no descendants.

It is the former case alone that has to be dealt with here. Considering the question as one solely on the construction of the statute, it is difficult, I think, to resist the conclusion that, if there are descendants but no children living to share the estate, it is to be divided into as many shares as there are children who have left living descendants, and that the descendants of each such child are to take as representing the child, and, of course, only the child's share.

The *Statute of Distributions* were drawn by a civilian, Sir *Walter Walker* (1), and seems to have been intended to introduce the rules of the Roman civil law into this branch of English law. 294] It is *therefore, perhaps, not irrelevant to remark that the

(1) See *Rex* v. *Raines*, 1 Ld. Raym., 571–574.

view of the construction of the statute which is taken above makes it conformable to the Roman law. It will be sufficient for this purpose to refer to the 118th Novell, and, as commentaries, to the Elements of *Heineccius* (1), and *Mühlenbruch's Doctrina Pandectarum* (2). Citations to the same effect might, I think, be multiplied to any extent.

The principal difficulty in the case is this: In *Toller* on Executors (which may almost be called the received text-book on the subject) a different opinion is expressed. [In the 7th edition, by *Whitmarsh* [1838,] the passage is at p. 374.] Various authorities are cited for this, but none of them apply to the case of descendants. The dictum is transferred into *Williams on Executors*, where, in the 6th edition [1867,] it occurs in p. 1385. But it appears to stand there on the authority of *Toller* alone, since the only cases cited are those cited by *Toller*, and irrelevant.

On the other hand, there is a remarkable passage in *Hargrave's* Jurisconsult Exercitations (3), in which, speaking of Dr. *Harris's* Justinian, he asserts what would seem to be the true construction of the statute; and a similar view is to be found in *Burton's* Compendium (4), which was, I believe, published about 1830, and has gone through numerous editions; and the true principle is stated in *Blackstone* and many other text-books, though the special distinction between descendants who can take only as children, or representatives of children, and next of kin who take in their own right, however remote, is not pointed out.

The text-books are, not, strictly speaking, authorities on such a question; if, however, there had been an absolute consent among them on a point likely to be of such frequent occurrence, one would have hesitated to pronounce an opinion in opposition to what might seem to be an established course of distribution. But in the face of the passage from *Hargrave*, which has been often referred to, and of the statement in all the editions of a popular elementary work like *Burton*, it cannot be said that there has been such a consent.

Feeling, therefore, free to follow my own clear opinion on the
295] *construction of the statute, I hold that in this case the sum in question must be divided into moieties, of which one is

(1) Pl., DCCXLVI.
(2) Pl., 682.
(3) Pages 270–2.
(4) Pl., 1403.

divisible among the descendants of *Alexander Ross* the younger, and the other among the descendants of *William Francis Ross*; the division among each class being in each case *per stirpes*.

Solicitors: Messrs. *Rixon & Son*; Messrs. *Francis & Bosanquet*; Messrs. *Fielder & Co.*

V.-C.W., Dec. 15, 22, 1871; Jan. 19, 20, 1872.

In re Clinton's Trust: Hollway's Fund. The Same: Weare's Fund.

[Law Reports, 13 Equity Cases, 295.]

Will — Devise of Real Estate — Tenant for Life — Reversionary Interest — Marriage Settlement — Covenant to Settle after Acquired Property — Conversion — "Entitled" in sense of "Entitled in Possession."

H. F. C., who died in 1852, by will gave real estates to trustees upon trusts for his wife for life, and, after her decease, for the benefit of his unmarried daughters. He gave power to the trustees after the decease of his wife, or the decease or marriage of all his daughters, or earlier, with the consent of his wife, or, if she should be dead, of his unmarried daughters, to sell the estates; and they were to invest the moneys and to pay the income to his wife for life, and, after her decease, to divide the principal moneys amongst such of his daughters as should be living at his decease, equally, as tenants in common. He left five daughters surviving. *L.*, one of them, in 1853, married *W.*, and *I.*, another of them, in 1858 married *H.* By the settlement made on the marriage of *I.* and *H.* she assigned to trustees certain trust funds and premises upon trusts during their joint lives to pay the income to her for her separate use, and, after the decease of either, to pay it to the survivor for life, and after the decease of the survivor upon trusts for the benefit of the children or remoter issue, as they should jointly appoint; and in default of such appointment, as the survivor should appoint; and in default, for the benefit of the children equally. The settlement contained a covenant by the husband and wife, that if, at any time after the marriage, and during their joint lives, they, or either of them in her right, should by gift, descent, succession, or otherwise, become entitled to any real or personal estate, property, or effects of the value of £100 or upwards, at any one time, the same should be conveyed, transferred, assured, and paid to the trustees upon the trusts declared. The testator's estates were, in 1867, with the consent of his widow, sold by the trustees, and they invested the proceeds in *East India Government Stock*. The widow died in April, 1871, leaving *I.* and *H.* surviving.

By the settlement made on the marriage of *L.* and *W.*, she assigned to trustees certain trust funds and personal estate upon trusts similar to those, *and [296 there was a covenant similar to that contained in the settlement of *I.* and *H.*

L. died in January, 1865, without having concurred in exercising the joint power of appointment. W. died in January, 1871. By will he appointed the trust funds and personal estate settled by his late wife.

The trustees of *H. F. C.'s* will sold the stock, and paid into Court, to a credit in *I.* and *H.'s* matter, the sum of £2290 18*s.*; and *I.* and *H.* by their Petition, prayed that it might be paid to *H.* The same trustees paid into Court, to a credit in *L.* and *W.'s* matter, a similar sum and some apportioned dividends; and the two surviving trustees of *L.* & *W.'s* settlement (who were also two of the trustees and executors of *W.'s* will), and the children of the marriage, by their Petition, prayed that it might be paid to the trustees of the settlement:—

***Held*, that "entitled" must be read "entitled in possession," and therefore that the fund in *I.* and *H.'s* matter was bound by the covenant, and must go to the trustees of the settlement, the required change in the property having taken place during the coverture; and that the fund in *L.* and *W.'s* matter was not bound by the covenant, and must go to *W.'s* legal personal representatives, there having been no change in the property during the coverture.**

PETITIONS. The first of these Petitions stated that *Henry Fynes Clinton* (who died on the 24th of October, 1852), by will dated the 29th of May, 1852, gave and devised certain freehold and copyhold hereditaments and premises, situate at *Welwyn*, unto two trustees, their heirs and assigns, upon trust to pay a life annuity (long since determined by the death of the annuitant), and subject thereto in trust for his wife and her assigns for life, and immediately after her decease upon trusts for the benefit of his unmarried daughters for the time being.

The testator declared that, after the decease of his wife, or the decease or marriage of all his daughters, or earlier, with the consent of his wife if living, or if she should be dead, with the consent of his unmarried daughters for the time being, the trustees for the time being should have power to sell the hereditaments and premises, and should invest the residue or surplus of the moneys arising from such sale in any of the securities therein specified, and should pay the interest, dividends, and annual produce thereof unto his wife and her assigns for life, and after her decease, should pay, transfer, and divide the principal moneys between and amongst his five daughters therein named, or such of them as should be living at his de-
297] cease, in equal shares, as tenants in common, and *not as joint tenants, their executors, administrators, and assigns. The trustees were appointed executors of the will.

The testator left his five daughters him surviving.

Ida Fynes Clinton, afterwards *Ida Fynes Burroughes*, widow, and who, in July, 1858, intermarried with *James Hollway*, was one

of such daughters; and *Louisa Emma Mary Fynes Clinton*, who, in August, 1853, intermarried with the Rev. *Thomas William Weare*, was another of such daughters.

By an indenture of settlement, dated the 7th of July, 1858, and made on the marriage of Mrs. *Burroughes* (formerly *Ida Fynes Clinton*) and Mr. *Hollway*, Mrs. *Burroughes* assigned unto three trustees, their executors, administrators, and assigns, certain trust funds and premises, not including the *Welwyn* estates, but including other property acquired under the will of the testator, upon trust during the joint lives of Mr. and Mrs. *Hollway*, to pay the income to her for her separate use, but not by way of anticipation; and after the decease of either Mr. or Mrs. *Hollway*, upon trust to pay the income unto the survivor during his or her life, and after the decease of such survivor, upon trust for such one or more of the children, or grandchildren, or other issue of Mr. and Mrs. *Hollway* as they should jointly appoint. And for default of such appointment, then as the survivor should appoint, and for default of such appointment, in trust for all the children of the marriage, equally, as tenants in common.

The settlement contained the following covenant: "And the said *James Hollway* and *Ida Burroughes* do hereby jointly, for themselves, their heirs, executors, and administrators, and each of them doth hereby separately, for himself and herself, and his and her heirs, executors, and administrators, covenant with the said *C. J. Fynes Clinton*, *W. R. Baker*, and *J. G. Hollway*, their executors and administrators, that if at any time or times after the solemnization of the said intended marriage, and during the joint lives of the said *J. Hollway* and *Ida Burroughes*, they or either of them in her right, shall by gift, descent, succession, or otherwise howsoever, become entitled to any real or personal estate, property, or effects, of the value or to the amount of £100 and upwards, at any one time (other than and except any interest which shall be restricted to the life of the said *Ida Burroughes*, and *settled or limited to her separate use and disposal, [298 without power of anticipation), then and in every such case the same shall be forthwith, at the costs of the said trust estate, conveyed, transferred, assured, and paid to the trustees or trustee for the time being of these presents, upon the trusts herein declared concerning the said premises hereinbefore assured by the

said *Ida Burroughes*, or such of them as shall be then subsisting or capable of taking effect, or as near thereto as the natures and qualities of the said properties respectively will admit of; and if such properties, or any of them, should consist of lands or hereditaments, then with such usual powers of leasing and selling and exchanging, and other ordinary provisions, as the trustees or trustee for the time being of these presents shall deem necessary or expedient."

There was issue of the marriage five children — all now infants and Respondents.

The freehold and copyhold hereditaments and premises at *Welwyn* were, with the consent of the testator's widow, sold in 1867, and the net proceeds of such sale were invested by the trustees in the purchase of £11,428 11*s.* 4*d.* £4 per Cent. *East Indid* Government Stock, and the dividends were duly paid to the testator's widow up to the day of her death, which occurred on the 25th of April, 1871.

On the 30th of October, 1871, the trustees of the will sold the stock; and after payment of legacy duty and certain costs, there remained a balance of £11,539 4*s.* 4*d.* cash, one-fifth part of which, (after deducting the costs of paying into Court) amounting to £2290 18*s.*, the trustees paid into Court to the credit of "In the Matter of the Trusts of the Share of the Proceeds of Sale of the *Welwyn* Estate bequeathed by the Will of *Henry Fynes Clinton* in favor of *Ida Fynes Clinton*."

The Petitioners, *James Hollway* and *Ida* his wife, prayed that, after the payment of the costs of the Petition, the residue of the sum of £2290 18*s.* might be paid to him.

The second Petition stated that by an indenture of settlement, dated the 22d of August, 1853, and made on the marriage of *Louisa Emma Mary Fynes Clinton* with the Rev. *Thomas William Weare*, Miss *Clinton* assigned unto three trustees, their executors, administrators, and assigns, certain trust funds and personal es-
299] tate, *upon trusts similar to those contained in the settlement of Mr. and Mrs. *Hollway* and set forth above; and the settlement of Mr. and Mrs. *Weare* contained the covenant set forth above within inverted commas.

There was issue of the marriage of Mr. and Mrs. *Weare* four children — all now infants.

Mrs. *Weare* died on the 11th of January, 1865, without having

concurred in exercising the joint power of appointment reserved to her and her husband by the settlement.

Mr. *Weare*, who died on the 24th of February, 1871, by will, in April, 1866, appointed three executors, and appointed that all the trust funds and personal estate settled and assured by his late wife should, from and immediately after his decease, be applied, in the first place, in providing portions for his three daughters as therein mentioned, and subject thereto he appointed the same to his son if he should attain the age of twenty-one years, and his executors, administrators, and assigns, absolutely; and he gave and bequeathed all his personal estate whatsoever and wheresoever to his trustees (subject to the payment of his debts) upon trust to pay the income to *H. M.* for life, and after her decease, upon the same trusts as declared concerning certain hereditaments comprised in the settlement. Mr. *Weare*, by a codicil in August, 1867, appointed two other persons jointly with the three named in his will to be trustees and executors of his will.

The trustees of the will of *Henry Fynes Clinton* set apart another fifth of the said sum of £11,539 4*s.* 4*d.* cash, amounting (after deducting costs of paying in) to £2290 18*s.*, which sum, together with a sum of £39 12*s.* 11*d.*, apportioned dividends, making together £2330 10*s.* 11*d.*, they paid into Court to the credit of "In the Matter of the Trusts of the Share of the Proceeds of Sale of the *Welwyn* Estate bequeathed by the Will of *Henry Fynes Clinton* in favor of *Louisa Emma Mary Fynes Clinton*."

The Petitioners — the two surviving trustees of Mr. and Mrs. *Weare's* settlement of August, 1853 (who were also two of the trustees and executors of Mr. *Weare's* will), and the four children of Mr. and Mrs. *Weare*, by their next friend — prayed that, after the payment of costs, the residue of the sum standing to the credit of this account might be paid to the Petitioners, the two surviving trustees of the settlement.

*The tenant for life died in April, 1871. [300

Mr. *Hardy*, Q.C., and Mr. *Loughborough*, for Mr. and Mrs. *Hollway*, the Petitioners on the first Petition :—

The object of a marriage settlement is to make a certain provision for the wife and children.

As to all property which the parties are known to be entitled to, whether in possession or reversion, vested or contingent, it is reasonable to suppose they would, at the time of marriage, determine what particulars should, and what should not, be brought into settlement; and it is not consistent with the nature and objects of a settlement that it should be left to be determined by a number of collateral chances whether property which the wife is known to be entitled to should or should not become subject to the settlement.

Apart, then, from the particular circumstances of this case, it is a reasonable inference that in a well-drawn settlement, by which property of the wife is settled, the covenant as to future property is intended exclusively to apply to property not known of at the time, and to property not then acquired.

In this case all the terms of the covenant point to what is unknown, contingent, and future. "To become entitled" must mean entitled generally, whether in possession, reversion, or otherwise; it is universal; it does not mean "become entitled to the possession of" what the party was already entitled to in law, subject only to a life estate, or other intervening interest. Of course, if the intervening life interest had afterwards been conveyed to the wife, that would have been within the covenant; but the natural determination of the intervening interest gives no new right or title. To hold that "to become entitled" means "entitled to the possession of property," would be too narrow and restrict the covenant. But if the terms of the covenant leave the matter in doubt, the provisions of this settlement show that it could not have been the intention of the parties that the fund in question should ever become subject to its provisions; for the settlement recites the testator's will, and actually settles property to which the wife was entitled under it; and with others, several reversionary interests.

Minute contingent interests are settled. The parties, therefore, were fully cognizant of the fund in question; they settled similar
301] *particulars belonging to the wife, and the inference seems irresistible that they did not intend to bring this particular fund into settlement.

Further, the fund is money which has arisen from the sale of real estate. It could not have been affected by the covenant, during the coverture, unless the estate had been sold; nor,

secondly, unless the mother had died; nor, thirdly, unless the fund had been actually received. Can it be imagined that the parties had these contingencies in view, and intended it should depend upon their happening whether the fund should or not be affected by the covenant?

The settlement must be construed like any other instrument. The Court will endeavor to find out what the intention of the parties was.

It must be admitted that the cases are not all reconcilable or satisfactory.

[They cited, on the general construction of the covenant, *Hoare* v. *Hornby* (1), *Otter* v. *Melvill* (2), *Atcherley* v. *Du Moulin* (3), *Wilton* v. *Colvin* (4), *Archer* v. *Kelly* (5), and *Dering* v. *Kynaston* (6); and, on the nature of the fund, *May* v. *Roper* (7) and *Briggs* v. *Chamberlain* (8).]

The case of *Franks* v. *Bollans* (9) having been mentioned by the Vice-Chancellor, it was stated that since the decision of the Lords Justices the case had, in view of an appeal to the House of Lords, been compromised.

Mr. *Higgins* (Mr. *Dickinson*, Q.C., with him), for the Respondents (the trustees of the settlement and the children of the marriage) on the first Petition:—

The property which has produced this fund is bound by the covenant. The words of the covenant are very large; they are—"gift, descent, succession, or otherwise howsoever become entitled *to;" and they refer to "any real or personal estate, [302 property, or effects."

In *Graffley* v. *Humpage* (10) the words of the covenant were in case the lady or her husband, in her right, should at any time during the coverture succeed to the possession of or acquire any property real or personal, by devise, descent, bequest, or otherwise, and they were held to include a reversionary interest, which fell into possession during the coverture.

(1) 2 Y. & C. Ch., 121.
(2) 2 De G. & Sm., 257.
(3) 2 K. & J., 186.
(4) 3 Drew, 617.
(5) 1 Dr. & Sm., 300.
(6) Law Rep., 6 Eq., 210.
(7) 4 Sim., 360.
(8) 11 Hare, 69.
(9) Law Rep., 3 Ch., 717.
(10) 1 Beav., 46.

In *Blythe* v. *Granville* (1) two sums of stock of which the lady was possessed were settled upon certain trusts, and after a discussion upon the meaning of the words "become entitled," the Vice-Chancellor said that they meant "either in possession or in reversion," and held that the stock was bound by the covenant.

Ex parte Blake (2) was a stronger case in favor of the Petitioners than the present, and yet it was held that the property of the lady was bound by the covenant. There was in the present case a change of interest during the coverture which brought the fund within the words of futurity in the covenant, and so there was in *Maclurcan* v. *Lane* (3), where the word "accrue" was much observed upon.

In *Re Hughes' Trusts* (4) there was a covenant similar to that in *Graffley* v. *Humpage*, for the words of it were, "gift, descent, succession, or otherwise become entitled to;" and it was held to include reversionary interests in consols.

In *Wilton* v. *Colvin* (5) the words of the covenant were in reference to the property of which the wife should, during the coverture, "become seised, possessed of, or entitled unto;" and it was held that the settlement contemplated future acquired title.

In *Otter* v. *Melvill* (6) the wife was absolutely and immediately entitled, at the date of the settlement, to the sum in question.

The case of *In re Browne's Will* (7) was one of tontine debentures, which were not reversionary, but in possession, and that was the ground of the decision. The Master of the Rolls said, 303] "The *lady was at that time both possessed of and entitled to this property;" and he afterwards added, that "if the parties to the settlement had intended to settle these tontine debentures, they would have done so by mentioning them in the settlement."

Hoare v. *Hornby* (8) was a case in which the words "all such further estate (if any) as shall, during the life" of the lady, "become vested in or accrue to her, or as shall or may be assignable," were used; and there it was held that the property was vested at the time of the settlement, and that it could not become vested. It is submitted that *Archer* v. *Kelly* (9), relied

(1) 13 Sim., 190.
(2) 16 Beav., 463.
(3) 5 Jur. (N. S.), 56, 59.
(4) 4 Giff., 432.
(5) 3 Drew, 617.
(6) 2 De G. & Sm., 257.
(7) Law Rep., 7 Eq., 231.
(8) 2 Y. & C. Ch., 121.
(9) 1 Dr. & Sm., 300.

upon on the part of the Petitioners, is an authority in the Respondent's favor; for there the wife's interest was changed in condition during the coverture, and here the property was converted during the coverture. It was changed in its condition from being a mere reversionary interest into money in possession, and therefore upon that authority it is bound by the covenant. The word "succession" in this covenant may be relied upon, and if alone, it would be quite sufficient to give the Respondents this fund. The plain meaning of all the words shows that the Petitioners interest in this reversionary realty, which became during their coverture reversionary personalty, was intended to be bound, and therefore it is submitted that it ought to be paid to the trustees of the settlement.

Mr. *Hardy*, in reply :—

Mr. *Higgins* (Mr. *Dickinson*, Q.C., with him), for the Petitioners (the two surviving trustees of Mr. and Mrs. *Weare's* settlement, and the four infant children of the marriage), on the second Petition :—

Re Hughes' Trusts (1), in which *Graffley* v. *Humpage* (2) was followed, is a clear authority in favor of these Petitioners. The covenant here refers to the future acquisition of title, and, assuming that the Court will take that view of the matter, it will be needless to carry the argument further.

Mr. *Hardy*, Q.C., and Mr. *Loughborough*, for the Respondents
304] *(the legal personal representatives of Mr. *Weare*) on the second Petition :—

Graffley v. *Humpage* (2) has been disapproved of by Vice-Chancellor Knight *Bruce* in *Hoare* v. *Hornby* (3), by Vice-Chancellor *Kindersley* in *Wilton* v. *Colvin* (4), and by the present Lord Chancellor in *Atcherley* v. *Du Moulin* (5), *In re Wyndham's Trusts* (6), and *Rose* v. *Cornish* (7).

Re Hughes' Trusts (8) was an extraordinary decision if the report be correct; but the marginal note is clearly wrong

(1) 4 Giff., 432.
(2) 1 Beav., 46; 3 Jur., 622.
(3) 2 Y. & C. Ch., 121, 123.
(4) 3 Drew., 624.
(5) 2 K. & J., 192.
(6) Law Rep., 1 Eq., 290, 293.
(7) 16 L. T. (N.S.), 786.
(8) 4 Giff., 432.

In re Pedder's Settlement Trusts (1), decided by the Lord Justice *James* when Vice-Chancellor, is conclusive.

Mr. *Higgins*, in reply, submitted that upon a general view of the law the current of authority was with these Petitioners; but he admitted that the decision in *In re Pedder's Settlement Trusts* was against them. He relied upon the decision in *Re Hughes Trusts*, and referred to *Atcherley* v. *Du Moulin*, where the words were "be or become entitled" during the coverture; *In re Wyndham's Trusts*; *Rose* v. *Cornish*, where the decision in *Graffley* v. *Humpage* was followed; and *Churchill* v. *Shepherd* (2).

Mr. *Reginald Hughes* appeared for the trustees of the testator's will.

SIR JOHN WICKENS, V.C.:

The law on this subject is in a very embarrassing state, and the decisions are in fact irreconcilable. I have on these two Petitions to deal with covenants which are in the same words, and which have been introduced into two different marriage settlements. What makes the case somewhat important is, that the covenants are in the usual form of conveyancers' precedents, and this form of words may be taken as likely to occur again.

305] *It must be taken as clear on principle and authority, that such a covenant, where the words are future, does not affect present property. The judgment of the Vice-Chancellor *James*, in the case of *In re Pedder's Settlement Trusts* (3), represents, I conceive, quite accurately the law as deduced from the cases cited before him. There can be no doubt that a covenant like the present applies exclusively to interests which the parties may acquire a title to after marriage, distinct from those vested in them at the time of marriage, and that there must be some change or other in the title to the property after marriage in order to bring it within the covenant. This change is described in the covenant by the words "become entitled to."

The expression "become entitled to" in these and most covenants of the sort applies, I conceive, only to an acquisition of interest by the wife, and this may mean an acquisition of

(1) Law Rep., 10 Eq., 585. (2) 33 Beav., 107.
(3) Law Rep., 10 Eq., 585.

property in which the wife had no interest at the time of marriage, and which vests in her absolutely during the coverture — or an acquisition of property which she was entitled to in remainder at the time of marriage, and which vests in possession during the coverture — or an acquisition of property in which she had no interest at the time of the marriage, which vests in her by way of future title during the coverture, but does not vest in possession till it is determined. There can be no doubt that the first of these three classes is within the covenant; the difficulty arises with regard to the other two classes. Both of them cannot be included in such a covenant, and the question is, which of them is, *primâ facie*, to be considered as so included. Now it seems to me, that in considering this question we start with some slight presumption that the object of a settlement being to exclude the marital right, it is more likely, and the Court will be inclined to hold that it was intended to affect property which comes into possession during coverture, and which, therefore, the husband may make his own; but that does not carry us very far. Then the nature of these settlements is to be considered. Each of them is an ordinary marriage settlement of the wife's property — that is to say, the income during the joint lives of the husband and wife is to be the wife's separate and inalienable property; it is then *to go to the [306 survivor for life; and there follow trusts for the children and remoter issue, as the husband and wife, or the survivor, may appoint; and in default for the children as tenants in common. Now, of course, these trusts, like all trusts in a marriage settlement, point to a limited period, and they must naturally be worked out during a certain time. If the wife during coverture should become entitled to a future interest, subject to a life estate or life estates, and such future interest be held to be included in the settlement, it might prolong the trusts till long after the youngest child's majority. There is no provision in the settlement for the sale of such a future interest; but there are some provisions which, by implication, negative the presumption that it was intended to be sold.

Then it is to be observed, as regards both covenants, that the property to be acquired is to be "of the value" of £100 or upwards. That seems to me to mean the actual value, and not the estimated value of a remainder acquired during coverture,

and not falling into possession till many years afterwards. All this points to a presumption that property falling into possession was intended to be included in such a covenant; but it is not to be denied that the effect of this remark is considerably diminished by what was said in the case of *In re Mackenzie's Settlement* (1).

Moreover the covenant goes on to say that when the title accrues the property is to be forthwith "conveyed, transferred, assured, and paid to the trustees or trustee for the time being." The second and fourth of these words point to possession only. "Assured" is equally applicable to present and future interests. Is it not a fair inference that all these words refer to the handing over of an interest in possession? Again, it is to be held, when handed over, upon the trusts "then subsisting or capable of taking effect." Are not these words strictly applicable to an interest in possession only, and not to a remainder in a money fund to take effect after a certain number of perhaps young lives? If assigned, the moment the title in remainder accrues, it could only be applied to the trusts then subsisting by means of a sale, which, as I said before, was not contemplated. The word "succession" in these particular covenants seems rather
307] *to support the same view. Putting authorities out of the question, and being obliged to elect between the two interpretations I have mentioned, I cannot, on the covenant standing alone, doubt that the word "entitled" must be read "entitled in possession," which, I am inclined to think, is the natural interpretation.

With regard to the authorities, though I do not propose to go through them, yet I think I must say that the decision in *James* v. *Durant* (2) cannot be reconciled with the more recent cases of unimpeachable authority. *Graffley* v. *Humpage* (3) is a peculiar case, and is only to be followed where the question is specifically the same. *Blythe* v. *Granville* (4) is clearly, I think, in accordance with the view I take of this case, and having been approved of by Vice-Chancellor *Kindersley*, Vice-Chancellor *Stuart*, and the Master of the Rolls, it is not lightly to be departed from. Nor do I understand that Vice-Chancellor *Knight Bruce*, in the case of *Hoare* v. *Hornby* (5), intended to

(1) Law Rep., 2 Ch., 345. (2) 2 Beav., 177.
(3) 1 Beav., 46; 3 Jur., 622. (4) 13 Sim., 190. (5) 2 Y. & C. Ch., 121.

dissent from the decision in *Blythe* v. *Granville* as distinguished from some of the *dicta* in that case. *Spring* v. *Pride* (5) is also in accordance with the view I have taken, though the words there are different; and *Archer* v. *Kelly* (6) seems to be another authority in the same sense. In *In re Mackenzie's Settlement* there are these very large words, "now is, or" . . . "shall become entitled" in any way whatever; and these words were, no doubt sufficient to justify the Lords Justices in holding that they included vested interests in remainder.

The result is as follows: With regard to the first Petition, I hold that the change required during the coverture to bring this money into the settlement took place by the reversion vesting in possession; and that the covenant binds it. As to the Petition in reference to *Weare's* Fund, I cannot see that there was any change at all in the property during the coverture; and I could not hold it bound by the covenant without dissenting from a long string of authorities.

At the same time, I am bound to say that, in arriving at this latter conclusion, I am taking a different view from that taken in **Re Hughes' Trusts* (1), and from that of the present [308 Lord Chancellor in *Rose* v. *Cornish* (2); but the grounds upon which those decisions were put seem to have been cut away by subsequent cases.

Therefore, on the first Petition the fund will go to the trustees of the settlement, and on the second Petition it will go to the legal personal representatives of Mr. *Weare*.

Solicitors: Messrs. *Loughborough & Son*.

C.J.B. Nov. 6, 13, 1871.

314] **Ex parte* BAILEY. *In re* JECKS.

[Law Reports, 13 Equity Cases, 314.]

Bankruptcy Act, 1869, *s.* 87 — *Execution Creditor* — *Trustee* — *Trader*.

An execution creditor who has seized the goods of his debtor before the latter has committed an act of bankruptcy is entitled to the proceeds of them as against

(5) 10 Jur. (N. S.), 646.
(6) 1 Dr. & Sm., 300.
(1) 4 Giff., 432.
(2) 16 L. T. (N.S.) 786.

the trustee. Therefore where goods of a non-trading debtor were seized on the 18th of February, and the debtor filed a petition for liquidation on the 22d of February:—

Held, that the execution creditor was entitled to the proceeds of the execution.

The *Bankruptcy Act*, 1869, has no retrospective operation, and where it speaks of traders, it means such persons only as were traders at the time when it first came into operation.

Therefore where a person had ceased to trade in 1868, but in 1871 owed various debts contracted during the period he was in trade:—

Held, that he was not a trader within the meaning of the *Bankruptcy Act*, 1869.

THIS was an appeal from an order of the County Court Judge of *Norwich*, dated the 2d of June, 1871, by which an application by Mr. *Elijah Crozier Bailey*, as the trustee of the estate of *Roger Allday Kerrison* and *Roger Kerrison*, who were partners in *Harvey & Hudson's* bank, at *Norwich*, to vary or rescind a previous order made on the 6th of April, and for a declaration that notwithstanding such order the sheriff might be at liberty to proceed with the sale under the execution, or that the proceeds of the goods, if sold, might be applied in payment of the execution creditor's debt, was dismissed with costs.

Mr. *Bailey* obtained judgment against *Jecks* for £4173 13*s.* 8*d.*, 315] *and on the 18th of February, 1871, a writ of execution was issued and delivered to the sheriff of *Norfolk*, who seized the goods of *Jecks* on the same day. On the 22d of February *Jecks* filed a petition for liquidation under sect. 125, and on the same day a receiver was appointed, and an interim injunction was granted until the 28th of February, on the application of *Jecks'* solicitor, to restrain Mr. *Bailey* and the sheriff from proceeding further in the action and execution. Various proceedings, by adjournment, took place before the Registrar until the 6th of April (trustees having been appointed under the liquidation on the 20th of March), when the County Court Judge, on the application of *Jecks'* solicitor, made the injunction against Mr. *Bailey* and the sheriff perpetual in consideration of the trustees of the estate of *Jecks* agreeing to pay the sum of £25 in discharge of the sheriff's poundage, officers' fees, and charges for possession. On the 2d of June the order appealed against was made by the County Court on the ground that the order of the 6th of April was drawn up with the consent of all parties.

It appeared from the evidence that *Jeeks* had formerly carried on business as a timber merchant, but had retired from business in April, 1868, and that a portion of the debt due to Mr. *Bailey* had been contracted by *Jecks* while in trade. Mr. *Coaks*, who was the attorney for Mr. *Bailey*, was also under-sheriff for *Norfolk*, and stated in his affidavit that he accepted payment of £25 simply in his character of under-sheriff, and that he did not, by so doing, intend in the slightest degree to prejudice the rights of Mr. *Bailey* under the execution. It appeared, however, that after the order of the 6th of April the sheriff withdrew from possession, and up to the 19th of May the trustees sold various portions of the goods without any objection being made by Mr. *Bailey*, who, it was alleged, must have known of the sales, as they were widely advertised in all the local papers.

Mr. *Reed*, and Mr. *Cozens-Hardy*, for Mr. *Bailey*:—

The acceptance of the £25 by Mr. *Coaks*, in his character of under-sheriff, cannot affect the rights of the execution creditor, and we deny that the order was made by consent. As the seizure preceded the act of bankruptcy, we are entitled as against the *trustee: *Slater* v. *Pinder* (1); *Ex parte Rocke* (2). At the [316 time the *Bankruptcy Act* came into operation *Jecks* had ceased to be a trader, and the act is not retrospective: *Ex parte Craven* (3). If the Court should be of opinion that *Jecks* is to be considered a trader, sect. 87 (4) would not apply, as there has been no sale.

[They also referred to *In re Plas-yn Mhows Coal Company* (5), and to sect. 15, sub-sect. 5, of the *Bankruptcy Act*, 1869.]

(1) Law Rep., 6 Ex., 228.
(2) Law Rep., 6 Ch., 795.
(3) Law Rep., 10 Eq., 648, 657.
(4) The 87th section is as follows:—
"Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding £50 and sold, the sheriff, or in the case of a sale under the direction of the County Court, the high bailiff, or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."
(5) Law Rep., 4 Eq., 689.

Mr. *Roxburgh*, Q.C., and Mr. *Finley Knight*, for the Respondents, the trustees of *Jecks'* estate:—

The order of the 6th of April was clearly made by consent, as *Slater* v. *Pinder* was not decided until the 3d of May, and the order was in accordance with the law as it then was: *Ex parte Veness* (1).

Part of the execution creditor's debt was a trade debt, and therefore *Jecks* must be held to be a trader: *Bailey* v. *Grant* (2); and sect. 87 of the Act of 1869 will apply even if there has been no sale.

Sir James Bacon, C.J., after stating the facts as above set out, continued:—

The application made to the County Court Judge on the 2d of June was made mainly upon the authority of a case then recently decided in the Court of Exchequer, *Slater* v. *Pinder*, in which it was held that an execution creditor on a judgment 317] *for less than £50 who had seized in execution the goods of his debtor, before the commission of an act of bankruptcy by the latter, was entitled to the proceeds of the execution against the trustee, although the adjudication was prior to the sale. On the part of the trustees it was insisted that whatever might be the law as pronounced by the authority referred to, the order of the 6th of April could not be disturbed, inasmuch as it proceeded upon a settlement or compromise of all matters then in dispute between the execution creditor and the trustees, and had been made upon the payment of £25, by which the creditor was relieved of all the expenses attending the sheriff's possession which he would otherwise have had to bear. It was further insisted by the trustees that, inasmuch as part of the debt for which the judgment had been recovered, and many other debts still owing by the debtor, had been contracted while he was in trade, the creditor was precluded by the 87th section of the *Bankruptcy Act* from all benefit of his execution. To this latter objection the execution creditor replied that the debtor had wholly ceased to be a trader from the month of April, 1868, that the 87th section of the Act had no retrospective operation, and, moreover, that no sale had taken place so as to bring it within the words of that section; and several affidavits on both

(1) Law Rep., 10 Eq., 419. (2) 9 Bing., 121.

sides were filed and used upon this occasion. The learned Judge was of opinion that the compromise upon which the order of the 6th of April was made, was full and effectual, and that it prevented him from entering upon a consideration of any of the other facts of the case, and his judgment was delivered in these terms :—

"I at first thought of reserving my decision for the purpose of referring to the law on the subject, and the practice and decisions on one or two points in the case; but after having heard both the learned gentlemen, and looking at the facts of this case and the sections of the statute relating to it, I find that it is an application under sect. 71 of the new *Bankruptcy Act* really to ask me, sitting in bankruptcy, to review or vary the order made on the 6th day of April last, which was an order made with the full knowledge and consent of all the parties upon the state of facts then existing. Much has been said by the gentlemen on both sides as to the question of the bankrupt being a trader or non-trader; but I do not think the question of trading or non-trading comes before me *to offer any opinion. The [318 real point appears to me to be the withdrawal of the sheriff. At that time the law was exceedingly doubtful as to whether the filing of the petition of arrangement by Mr. *Jecks* altogether defeated the execution and seizure by Mr. *Bailey*; and Mr. *Bailey*, acting as he was for a large body of very jealous creditors, took the opportunity of consulting one of the most able legal advisers he could, who happened to be also the undersheriff, and who, in order to save the estate of *Harveys & Hudsons* the probable costs and expenses attending the seizure, willingly consented to withdraw, taking the sum of £25 in discharge of sheriff's poundage and other expenses, by which the estate of *Harveys & Hudsons* was exonerated from all liabilities in reference to the execution; and an order was prepared carrying this agreement into effect. That order being completed with the knowledge and consent of all competent parties, and a sum of money being accepted by the sheriff—accepted in point of fact by the execution creditor, in discharge of the sheriff's poundage, officers' fees, and charges of possession—it cannot now be varied or altered on the application of one of the parties to it; and I am of opinion that no case has

been made out to induce me to interfere with it. I must, therefore, decide against the application."

The motion was therefore refused with costs on the 2d of June, and it is against that order that the present appeal has been brought. The same facts, and arguments similar to those which were addressed to the learned Judge, have been brought to my attention; and with one very important addition of which he had not the benefit—I mean the recent decision of the Lord Chancellor in *Ex parte Rocke* (1)—the materials for deciding the questions between the parties are the same. I had decided in the last mentioned case that the seizure by an execution creditor which had not been completed by sale before the title of trustee had accrued could not prevail against that title, but that the goods seized in execution belonged to the trustee, to be administered by him for the general benefit of the creditors. I had arrived at that conclusion after the best consideration that I could give to all the provisions, and to what I considered to be the scope and meaning of the statute—not without a full 319] recollection that sect. 184 of the *Act of 1849 had, with other sections of the former statutes in bankruptcy, been repealed, but with the full conviction that it was the intention of the Legislature that the wholesome provisions of that section should still remain in force, and that the enactments of the existing statute would supply the place of the repealed clause, and that no intention was expressed in nor could be inferred from the enactments that it was the object of the Legislature to abrogate in effect one of the most important rules which had been established for the protection of the general creditors, which rule had been in beneficial operation since the statute of 1849 (which contains the sect. 184) was passed, and which had made the English law in bankruptcy in accordance with the principles of bankrupt law in other countries. As I have expressed my conviction and the reasons by which it was arrived at in the previous cases, it is unnecessary to repeat them. And, indeed, I feel it would be improper to say any more on this subject, since it has been decided by authority by which I am not only bound, but to which I most sincerely defer, that the law is different from that which I had taken it to be. The case of *Slater* v. *Pinder* (2) was decided on a special case. It was first heard

(1) Law Rep. 6 Ch., 795. (2) Law Rep. 6 Ex., 228.

before Baron *Martin* and Baron *Bramwell*. The question, which was the same as that which arose in this case, was thought so new and important that those eminent Judges directed it to be reheard before the whole Court. Upon the rehearing, which took place before the Chief Baron and the Barons, *Martin Channell, Cleasby*, Mr. Baron *Martin* read a judgment which he had prepared after the first hearing, in which he stated largely the grounds of his decision. That decision was, that the trustee was entitled only to the proceeds of the execution remaining after satisfying the execution. The other learned Barons also delivered separate judgments after hearing the second argument in which they all concurred in deciding that inasmuch as sect. 184 of the Act of 1849 had been repealed and not re-enacted, an execution levied by seizure before an act of bankruptcy being valid at common law and not affected by any statutory enactment, required no statutory or other protection, but remained effectual, although adjudication in bankruptcy might occur before the 320] sale. That *case was not before me when I decided in *Ex parte Rocke* (1) that an execution creditor who had seized but had not sold, the goods of his debtor before the presentation of a petition for liquidation, and who was restrained from proceeding, was not entitled to the proceeds of the sale as against the trustee. From that decision an appeal was brought and argued before the Lord Chancellor and Lords Justices, who adopted the judgment of the Court of Exchequer, noticing the difference between the Act of 1849, which contained sect. 184, and the statute now in operation, which contained no such provision, and the order appealed from was accordingly, and for that reason, reversed.

Such, then, being the state of the law as established by the decisions I have referred to, it appears clear that the order now appealed from is not in accordance with the law so established. The learned County Court Judge pronounced no opinion on that point of law, but being of opinion that the creditor was bound by the compromise which had been entered into, and the payment of £25 by the trustee on the footing of that compromise, it was not to be disturbed on the grounds which had been submitted to him. Now, having considered the affidavits, and attending particularly to those which relate to this part of

(1) Decided on April 17; 25 L. T. (N.S.), 267.

the case, and to the circumstances which were then in the contemplation of the parties, and it being, I think, clear that the consent of the creditor to the sheriff's withdrawing was made upon a misapprehension of the true effect of the statute, I cannot say that the other grounds upon which the Court was asked to vary or rescind the order of the 6th of April were to be disregarded. The order was not drawn up, nor is it expressed to be, by consent. It is positively stated by the creditor's solicitor (who was also the under-sheriff) that in demanding payment of the sheriff's poundage and fees, and in accepting the sum which was paid, he did so without prejudice to the rights of the execution creditor; and although the trustees say that this was not their understanding, I do not find that the statement of the creditor's solicitor is effectually contradicted, and I think it would be too much to say that the order of the 6th of April is one which cannot or ought not to be reconsidered.

321] *Then as to the point of the debt or some part of it having been contracted while the debtor was a trader, I am of opinion that the existing statute has, in this respect, no retrospective operation, and that it speaks of and refers only to such persons as, at the time of its commencement, were or should afterwards become, traders. How it may be — I venture to say it is — a matter to be regretted that by the repeal of the 184th section of the Act of 1849, and the failure of the provisions of the existing statute to supply the defect occasioned by that repeal, the protection to creditors which the repealed section afforded has been lost to them, and some of the inconveniences which the state of the law antecedent to 1849 had occasioned will flourish in their old and vicious force. It may be that the Legislature will think fit, by some future enactment, to supply the existing defect. With these considerations I have nothing to do. I find the law clearly expounded and authoritatively established, and in accordance with that law I am bound to declare that the orders of the 6th of April and of the 2d of June must be discharged. Having regard to what has taken place between the parties, the order now to be made must be so guarded as to do justice to all parties so far as is practicable. It appears that in consequence of the order of April (which, although it was not consented to, was concurred in by the Appellant), the trustees have sold the goods taken in execution,

and that this was done with the knowledge of, and without objection by, the Appellant. The order now to be made must, therefore, be to declare the rights of the creditor, direct an account to be taken of the goods seized in execution and sold by the trustees, and to direct them to pay over to the execution creditor the net proceeds which shall appear to have been received by them, deducting the costs and expenses attending and incident to the sale, and deducting also the sum of £25, which was paid to the sheriff. There can be no costs of the appeal, but the deposit must be returned to the Appellant.

Solicitors: Messrs. *Linklater & Co.*, agents for Mr. *Coaks, Norwich*; Messrs. *Slee, Ovans, & Bayley*, agents for Mr. *Taylor, Norwich.*

As to when the execution creditor is entitled to retain his lien as against an assignee in bankruptcy, see Bump's Law of Bankruptcy, 4th edition, p. 196, *et seq.*; see also Index to same title "Liens."

M.R., Jan. 15, 18, 1872.

*Labouchere v. Dawson. [322

[Law Reports, 13 Equity Cases, 322.]

[1871 L. 174.]

Sale of Goodwill — Vendor setting up new Business — Right to solicit old Customers.

The vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighborhood or elsewhere, and may publicly advertise the fact of his having done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself.

Previously to June, 1871, a long-established brewery business had been carried on at *Kirkstall*, near *Leeds*, under the firm of *Benjamin Dawson & Co.* The Defendant, *Edwin Popplewell Dawson*, was entitled to two-fifths of this business; the remaining three-fifths formed part of the estate of *Benjamin Dawson*, deceased, which, in June, 1871, was being administered by the Court of Chancery.

On the 12th of June, 1871, an agreement in writing was entered into (subject to the sanction of the Court of Chancery) for the sale by *Edwin Popplewell Dawson* and the legal personal representative of *Benjamin Dawson* to the Plaintiffs, *Henry Labouchere* and *John Staniforth* (trustees for the Plaintiffs, the *Kirkstall Brewery Company, Limited*) of the brewery at *Kirkstall*, and the plant, fixtures, utensils, and machinery in and about the same, and also "the goodwill of the brewery business hitherto carried on at the premises in *Kirkstall* hereinbefore mentioned, and the exclusive right to use the name of *Benjamin Dawson & Co.* in connection with the business of brewers." The agreement contained no stipulations to prevent the Defendant from himself setting up business as a brewer.

The agreement received the sanction of the Court, and had been carried into effect by the Plaintiffs.

In December, 1871, the Defendant, *Edwin Popplewell Dawson*, commenced to carry on the business of a brewer at *Burton-upon-Trent*, and, as was alleged by the Plaintiffs, gave out that such new business was a continuation of the business formerly carried
323] *on by the firm of *Benjamin Dawson & Co.*, and also, by his travelers and agents, solicited the customers of that firm for orders. Thereupon the present bill was filed, praying for an injunction to restrain the Defendant, first, from carrying on the business of a brewer in such a manner as to represent, or induce customers to believe, that the business carried on by him was the same as or in continuation of or in succession to or similar to the business of a brewer formerly carried on under the name of *Benjamin Dawson & Co.*; and, secondly, from soliciting orders from any persons who were customers of the late firm of *Benjamin Dawson & Co.* at the time when their business was purchased by the Plaintiffs, and from attempting to take away any portion of that business, and from doing any act prejudicial to the goodwill thereof.

A motion was now made for an injunction according to the terms of the prayer. At the Bar the Plaintiffs abandoned the relief sought, except as to the solicitation of the customers. The Defendant, however, insisted on his right to solicit the customers of the old firm; and it was arranged that the question should be decided on the motion.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Fry*, Q.C., and Mr. *W. F. Robinson*, for the Plaintiffs:—

We admit that the Defendant is fully entitled to set up business as a brewer,—nay, more, that he is entitled publicly to advertise the fact of his having done so; and if the old customers choose to deal with him, we cannot prevent them. But he must not directly solicit their custom, for by so doing he would destroy the goodwill which he has sold to the Plaintiffs. The principle that a man may not derogate from his own grant applies.

Sir *R. Raggallay*, Q.C., and Mr. *Marten*, for the Defendant:—

The purchasers of the goodwill of a business are liable to the chance of the vendors not retiring from business, and carrying off the customers of the old establishment: *Cook* v. *Collingridge* (1); *Davies* v. *Hodgson* (2). It is admitted that the Defendant may solicit the customers of the old firm by public advertisement, but *it is said that he must not solicit them pri- [324
vately; but how is it possible to draw the line between public and private solicitation? If he may put an advertisement in the newspapers, why is he to be prevented from sending a circular? Moreover, why should the Defendant be prevented from soliciting old customers to purchase from him articles differing in kind or quality from those supplied by the old firm? No authority has been cited in support of the application; and in fact *Cruttwell* v. *Lye* (3) and *Churton* v. *Douglas* (4) are authorities the other way.

[They referred to *Johnson* v. *Helleley* (5) and *Hall* v. *Barrows* (6).]

Jan. 18. Lord Romilly, M.R.:—

This suit, as far as I can ascertain, appears to involve a new question. The facts are these:—[His Lordship stated them.]

The Defendant, having set up business at *Burton*, has solicited all customers to come to his place of business. Nobody can

(1) *Collyer* on Partnership, p. 174.
(2) 25 Beav., 177.
(3) 17 Ves., 335.
(4) Joh., 174.
(5) 34 Beav., 63; 2 D. J. & S., 446.
(6) 33 L. J. (Ch.). 204.

doubt that he was fully justified in doing that. The sale of the business did not prevent him from carrying on the same business in the same place or at *Burton*, which is a considerable distance off. But the question is this: Was he entitled to solicit personally the customers of the old firm to come and deal with him?

Now all the cases admit that he is entitled to carry on the same business wherever he pleases, and to solicit customers in any public manner that he pleases. Then it is argued that the power of soliciting the whole of the public to deal with him includes the power of soliciting any one particular person who is a member of the public. On the other hand, the Plaintiffs say this: "You cannot violate this principle, that if you sell a thing you are not entitled to take away its value. It is true that you sold it without binding yourself not to carry on the same business, yet you did sell it expressly including the goodwill, that goodwill being the probability of the old customers going to the new firm to which you have sold the business. 325] The question is, may you go to those very *persons and try to prevent their giving their custom to the new firm? It is very true you have not entered into an express covenant that you will not do that; but there is an implied covenant to that effect, for a person cannot sell a thing and destroy the value of it."

I have considered the matter very carefully, and although the point is suggested or hinted at in one or two cases, yet in no case I have been able to find has this simple question come before the consideration of the Court. I am of opinion that the principle of equity must prevail, that persons are not at liberty to depreciate the thing which they have sold. Sir *Richard Baggallay* put this question to me very forcibly and very properly: Where are you to draw the line? I will state what appears to me the principle that applies to such cases. In a great number of cases the Court has to deal with a matter which is never precise until the facts are brought before the Court. There is no point on which a greater amount of decision is to be found in Courts of Law and Equity than as to what is reasonable; for instance, reasonable time, reasonable notice, and the like. It is impossible *à priori* to state what is reasonable in such cases. You must have the particular facts of each case

established before you can ascertain what is meant by reasonable time, notice, and the like. So, in this case, I am of opinion the Defendant is not at liberty personally to solicit the customers of the old business to come to the new business. But this does not exclude what is a reasonable or fair solicitation of those customers; this, however, is a matter to be determined in each particular case. I will specify what appears to me to be the rule in the present case, so far as it can be laid down. In the first place the new firm, the Defendant in this case, is entitled to publish any advertisement he pleases in the papers, stating that he is carrying on such business. He is entitled to publish any circulars to all the world to say that he is carrying on such a business; but he is not entitled, either by private letter or by a visit, or by his traveler or agent, to go to any person who was a customer of the old firm and solicit him not to continue his business with the old firm, but to transfer it to him, the new firm. That is not a fair and reasonable thing to do after he has sold the goodwill. Customers, it is true, may be affected by public advertisements *and public circu- [326 lars, but that does not in the slightest degree militate against the principle I have laid down.

Then it is said, Where are you to draw the line? because this might happen, that a person might publish circulars in the papers, which circulars could have no meaning whatever, except as a solicitation to old customers of the old firm, and they would be unmeaning if they related to any new one. If such a question as that came before me, exactly in those terms, I should hold it to be merely a colorable departure from what he was not to be allowed to do, that is, to send a circular to customers of the old firm, requesting them as customers of the old firm not to go on dealing with the person to whom he had sold the business, but to retain and employ him, who had conducted the old firm. That is the way I should look at it, and therefore to that extent I should grant the injunction; and I should say that the Defendant was not to be at liberty to apply to any of the old customers privately, by letter, personally, or by traveler, asking them to continue their custom with the Defendant, and not to go to the vendees. There I should stop, and I should test any other case by considering whether it was within those limits or not. That is the general way in which I should look

at it. I have considered the case as much as I could as the parties were disposed to say that they would, subject of course to the right of appeal, consider this as the hearing of the cause; I therefore thought it would be desirable for me to consider what I ought to do with the costs, whereas in the case of an ordinary motion they would be governed by the general rule. Treating it as the hearing, I think this is a case in which I should not give any costs at all. I do not think the point has been decided, at least I cannot find it has been decided, or intended to be decided, in any of those several cases before Lord *Eldon*, who was the great authority on the principles relating to these matters. Therefore I shall grant this injunction, without costs; and with the consent of all parties, stay all further proceedings in the cause, but reserving liberty to apply in case anything should require it subsequently.

MINUTES:—Order that an injunction be awarded against the Defendant, *Edwin Popplewell Dawson*, to restrain him, his partners, servants, or agents, from apply-
327] ing *to any person who was a customer of the firm of *Benjamin Dawson & Co.*, prior to the 12th of June, 1871, privately, by letter, personally, or by a traveler, asking such customer to continue to deal with the Defendant, or not to deal with the Plaintiffs, the *Kirkstall Brewery Company, Limited*.

Solicitors: Messrs. *Nash, Field & Layton*; Messrs. *Paterson, Snow, & Burney*.

V.-C.M. Jan. 25, 1872.

355] *ROLLINS v. HINKS.

[Law Reports, 13 Equity Cases, 355.]

[1871 R. 164.]

Injunction — Validity of Patent — Restraining Publication — Necessity of following up Threats of Legal Proceedings — Scire facias to try the Validity of a Patent.

There is no presumption in law in favor of the validity of a patent, and therefore a patentee is not entitled to publish statements of his intention to institute

legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention to follow up his threats by taking such proceedings, and the Court will in such case restrain him from making such publication.

A person alleging the invalidity of a patent is not bound to assert his claim by *scire facias*, in order to establish his right to restrain the publication of statements by the patentee, threatening with legal proceedings persons buying articles of his manufacture alleged to be infringements of the patent.

THIS was a motion to restrain the Defendants from further publishing, or causing to be published or distributed, a certain advertisement and a circular.

The Plaintiff, in September, 1871, purchased a large number of lamps, manufactured with a burner made according to an American patent, dated the 20th of September, 1859, described in a volume of reports of the *United States* Patent Office, for 1859, which had been received at the Great Seal Patent Office in this country on the 31st of August, 1861, and called the "American Double Wick Lamp Burner," and about the same time he inserted the following advertisement in "*The Grocer*," a newspaper circulating amongst dealers in lamps:—

"Having arranged for an immediate supply of the American

"The attention of our clients, Messrs. *James Hinks & Son*, has been directed to your advertisement in "*The Grocer*," in which you state that you are prepared to receive orders for execution, on arrival of stock, for a double wick lamp-burner lamp, which appears to be an infringement of our client's patent, and also that you are prepared to give protection against any threats of legal proceedings by persons claiming (as our clients do) to have the exclusive right to manufacture such burners.

"If this statement of yours is really honest, you will have no objection in complying with a request which we now make, that you will send us immediately, on the arrival of stock, one of the double wick lamp-burner lamps, for which we are prepared to pay in advance if required.

"We make this purchase, as we give you notice, simply for the purpose of having formal proof on which to found legal proceedings against you, and this proof if, as we have before observed, your advertisement means what it says, you will be anxious to give."

To this letter the Plaintiff replied to the effect that he would forward one of his lamps to the Defendants when his stock arrived.

In the number of "*The Grocer*" which came out on the 30th of September, 1871, the following appeared:—

"Duplex Lamps.
"To the Trade.

"Our attention has been directed to an announcement that an infringement of our patent is being made in *America* for sale in this country. Constant threats of these infringements have been held out to us for some time past, to induce us to make arrangements with our rivals, but have never yet been carried into effect by the actual sale in this country of any one of the infringements.

357] "Whenever an actual sale does occur, we shall at once proceed by injunction against the offender, and in all cases in which we can prove that this notice has come to their knowledge, shall also sue for damages.

"Yours truly,
"*James Hinks & Son.*
"*Crystal Lamp Works, Birmingham.*"

On the 3d of October, 1871, the Plaintiff sent one of his lamp-burners to the Defendants' solicitors, together with a letter, in which he stated as follows:—

"Referring to your favor of the 26th ult., and my reply of the 27th, I have now the pleasure in handing you invoice of lampburner, which has been this day forwarded to your address.

"I trust you will commence action at once."

The Defendants' advertisement in "*The Grocer*" was repeated on several occasions, and they soon afterwards printed and commenced circulating through the post the following circular:—

"Important Notice.
"Duplex Lamp.
"To the Lamp Trade.

"Dear Sir,—Our attention has been directed to an announcement that an infringement of our patent is being made in *America* for sale in this country. Constant threats of these infringements have been held out to us for some time past, to induce us to make arrangements with our rivals, but have never yet been carried into effect by the actual public sale in this country of any one of these infringements.

"To prevent the possibility of your being unwittingly involved in any difficulty, we think it only right to state that dealers in lamps and shopkeepers generally are hereby specially warned that on the discovery of the public sale of any of the said burners, made in infringement, we shall at once proceed by injunction against the offender, and in all cases in which we can prove that this notice has come to their knowledge, shall also sue for damages.

"Yours respectfully,
"*James Hinks & Son.*
"*Crystal Lamp Works, Birmingham.*"

A correspondence then took place between the solicitors [358 for the respective parties, the Plaintiff's solicitors urging that the Defendants should either withdraw the advertisement and the circulars, or immediately commence proceedings against them, and the Defendants' solicitors maintaining their right to select their own time for commencing proceedings. In the

course of this correspondence the Plaintiff had intimated his belief that both the patents had been anticipated, and that both parties were interested in not raising a contest.

It appeared from the Plaintiff's evidence that his usual customers declined to buy his lamps, in consequence of the advertisement and the circulars, even though he offered to indemnify them against any proceedings on the part of the Defendants.

He accordingly filed the bill, and now moved for an injunction in terms of the first paragraph of the prayer.

Mr. *Glasse*, Q.C., Mr. *Theodore Aston*, and Mr. *Ingle Joyce*, for the Plaintiff:—

The Court has jurisdiction to restrain the publication of any document tending to the destruction of professional reputation by which property is acquired: *Dixon* v. *Holden* (1); and a man has no right to go about asserting in general terms that another person is infringing his patent, without being prepared to justify such an assertion: *Wren* v. *Weild* (2). He has no right to threaten intending purchasers with legal proceedings without meaning to follow up his threats.

[The VICE-CHANCELLOR:—I have already, I think, decided in *Dalziel* v. *Railway Carriage and Steamboat Gaslight Company*, that a man has no right to go about boasting of a patent, and not attempt by action to try its validity.

It appeared, on inquiry, that the case referred to had been compromised after the Vice-Chancellor had expressed an opinion to the effect stated.]

The initiative was necessarily thrown upon the Plaintiff by the course the Defendants took, and on a proceeding by *scire facias* by the Plaintiff the question could not be effectually tried. 359] It is a *process which has never been acted on since the *Patent Law Amendment Act*, 1852 (15 & 16 Vict. c. 83), and it would be quite open to the Defendants to defeat the process by merely showing some difference between the articles in question; though it might be, at the same time, that his claim would cover both articles.

(1) Law Rep., 7 Eq., 498. (2) Law Rep., 4 Q. B., 218.

Mr. *Cotton*, Q.C., and Mr. *Lawson*, for the Defendants :—

The Defendants have a grant from the Crown by patent, which they have held for seven years unchallenged, and it is not for them to go into a Court to establish their rights except at such times as they choose; and they have a perfect right to warn others against infringing their patent. There is no difficulty in trying the validity of the patent on a *scire facias*, and the advertisement and circular are not open to any legal objection. It leaves the Defendants quite free to commence an action when they please. The circular, moreover, is in general terms, and there may be other parties who are infringing the patent. Moreover, the Plaintiff is precluded from relief by his suggestion to collude with the Plaintiff in treating the patents as being both valid when he believed them to be invalid.

Mr. *Glasse*, who was only called upon to reply as regarded the letter, said that it only meant that the Plaintiff did not wish to contest the matter without necessity.

Sir R. Malins, V.C. :—

The Plaintiff, as I understand, is an American citizen, domiciled in this country for the purpose of his business, which is that of an importer of American articles. The Defendants carry on business at *Birmingham*, as lamp manufacturers, and in the year 1865 they obtained a patent for an improved lamp-burner, which they, of course, contend is a valid patent. It appears that in 1861 a patent was taken out in *America* for a lamp-burner, certainly very similar in form and description to that of the Defendants. The Plaintiff imported a large quantity of the American lamp-burners, the patent for which had been published in *England*, sufficiently to affect the Defendants' patent, if it is of the same character, or *unless the De- [360 fendants' is an improvement upon the former one. The quantity imported being large, the fact came to the knowledge of the Defendants, who accordingly instructed their solicitors to write to the Plaintiff in the following terms:—[His Honor read the letter, above mentioned, of the 26th of September, and continued :—] I read that letter as an expression of intention on the part of the Defendants to take the earliest opportunity,

at law or equity, as they might be advised, of preventing the sale of what they considered to be an infringement of their patent. To that a reply was sent. [His Honor here read the Plaintiff's letter in reply, and continued:—] Nothing could have been fairer up to this point than the conduct of both parties: the Defendants were anxious to restrain an infringement of what they believed was their *bonâ fide* patent, and the Plaintiff was desirous to have the question decided immediately. However, the Defendants have not brought, and will not bring an action. Mr. *Cotton* only says that they will take whatever steps they may be advised in their own good time; but this refraining from bringing an action, after their threat to do so, is of itself strong evidence of doubt on their part. Mr. *Lawson* suggested that they wanted to choose their Defendant, and they did not like the Plaintiff; but that was only an afterthought. [His Honor then commented on the facts and continued:—] Then, do the Defendants believe in the validity of their patent? If they do, these circulars may be issued in good faith; but if not, I consider them so totally wanting in good faith as to approach closely to fraud. The Plaintiff would, in all probability, be carrying on a large business in these articles if it were not for the circulars; and the question arises whether his trade is to be destroyed by men who, while alleging their right to do so under their patent, will not bring the action which they have been threatening ever since October, but which they will not even undertake to bring within a limited time. This is not the first time a case of this kind has arisen. There was the case of *Dixon* v. *Holden* (1), where the Plaintiff had been informed that a notice would be published in which he was alluded to as being a solvent partner in an insolvent firm, of which he was in fact not a partner at all, and on the Defendants contending 361] for the right to publish *the advertisement, I granted an injunction to restrain the publication. My decision was not appealed from, and I am satisfied that it was correct. I there said (2): "In the decision I arrive at I beg to be understood as laying down that this Court has jurisdiction to prevent the publication of any letter, advertisement, or other document, which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or

(1) Law Rep., 7 Eq., 488. (2) Law Rep., 7 Eq.. 494.

intangible property — whether it consists of money or reputation." If the Defendants had been acting in good faith, and there were any reason for delay in commencing proceedings, they might have stated it; but I have not heard a plausible excuse alleged. Then the difference appears to be very slight between the two articles, and I am by no means favorably impressed with the validity of the Defendants' patent; and I am bound to come to the conclusion that the Defendants are not very favorably impressed with it themselves, for, of course, as soon as they could once establish that validity they would have a perfect right to issue these circulars throughout the country. The contention of the Defendants is, that a patent is *primâ facie* good. But this cannot be so, for the rule is, that where letters-patent have been recently granted, an injunction will not be granted till the right has been established. The necessity for this rule appears from such cases as *Rushton* v. *Crawley* (1). If, however, a patent is of ten or a dozen years' standing, the rule may be different. If this were not so, a man, by taking out a patent for something old, might issue circulars to prevent another man from selling an article which was sold twenty years ago — before the patent was taken out. That, in my opinion, would not be proper. The result, therefore, is, that the Defendants must either establish their patent or cease to issue these notices; they must not, because they have got the colorable protection of a patent, issue circulars which have the effect of intimidating the public, and thereby totally destroying the trade of the Plaintiff. As to the point with regard to the Plaintiff applying for a *scire facias* to rescind the patent, I think there are so many difficulties in his way in that mode of proceeding that he ought not to be put to that remedy, but that the Defendants are bound to do what they have threatened. I am *of opinion, therefore, that until they have established [362 the validity of their patent, they must be restrained from issuing these circulars and advertisements. I understand that the Plaintiff is willing to admit that the articles he has sold are covered by the claim in the Defendants' specification, and the order will be prefaced with a statement to that effect.

Solicitors: Messrs. *Ingle, Cooper, & Holmes*; Messrs. *Burton, Yeates, & Hart.*

(1) Law Rep., 10 Eq., 522.

V.-C.M., Dec. 21, 1871.

WILSON v. FERRAND.

[Law Reports, 13 Equity Cases, 362.]

[1871 W., 219.]

Motion to stay Proceedings pending Litigation in France — French Contract.

A., an Englishman domiciled in *France*, entered into a contract in *France* with *B.*, a Frenchman, for carrying out jointly certain mercantile undertakings. In the course of the transactions large sums of money came into the hands of *C.* and *D.*, foreign merchants in business in *London*. *A.* filed a bill against *B.*, *C.*, and *D.*, alleging that, under the contract with *B.*, he was entitled to participate in the profits of the undertaking, and praying for an account from *C.* and *D.*, of the money in their hands, and that they might be restrained from handing it over to *B.* The Defendants moved to stay all further proceedings in the suit pending certain proceedings in the French Courts instituted by *A.* against *B.*, in which a construction would be put upon the French contract:—

Held, that there being portions of the relief sought, as to which the Defendants were bound to answer, the motion, which was in the nature of a demurrer, could not be sustained, and must be refused with costs.

THE bill, which was filed in October, 1871, stated as follows:—

The Plaintiff was a merchant and commission agent, and had resided in *France* for many years. In July, 1870, he was in *Paris*, and was endeavoring to obtain a commission from the French Government for the purchase of stores and provisions; he there met the Defendant *Emile Ferrand*, with whom he had been intimately acquainted for many years, and to whom he had frequently rendered considerable pecuniary and other services. The Defendant had recently been unsuccessful as a sugar baker, and was then penniless. The Plaintiff explained to the Defendant *Ferrand* the object he had in view with regard to obtaining
363] *commissions from the Government, and the Defendant represented that he was personally acquainted with several of the French ministers, and that his services would materially assist the Plaintiff in his plans, while the Plaintiff's business connections with *England* would enable him to carry out these commissions in a satisfactory manner. It was then agreed that the Defendant should assist the Plaintiff by all means in his power to obtain the proposed business, and that any commissions the Plaintiff or Defendant might succeed in obtaining from the French

Government should be divided between them in the following proportions, viz.: that the Plaintiff should receive 75 per cent. and the Defendant 25 per cent. of such commissions. In pursuance of the agreement between the Plaintiff and Defendant several orders for the purchase of arms and provisions were obtained from the French Government by the Defendant on behalf of himself and the Plaintiff.

The Defendants *Alfred de Coulon* and *A. H. Berthoud* were foreigners, and were carrying on business in *London* under the firm of *De Coulon, Berthoud, & Co.* The Defendant *Ferrand* had entered into negotiations with *De Coulon & Co.*, for the carrying out of the contracts obtained from the French Government by *Ferrand*, and a large amount had been paid to them by such Government. The Defendants *De Coulon & Co.*, had paid over considerable sums of money to *Ferrand* for commissions payable to him and the Plaintiff in respect of the aforesaid contracts; but they still had in their hands large sums of money representing commissions paid by the French Government in respect of the said contracts, which belonged to the Plaintiff. Part of these sums they had invested in consols, in *London*, in their own names and in the name of a M. *Langlois*, who had acted as agent for *E. Ferrand*, and they were, in fact, trustees of such sums for the Plaintiff or the Defendant *Ferrand*.

The Defendant *Ferrand* repudiated all liability to account to the Plaintiff for any share in these commissions, and he pretended that the contracts were entirely negotiated by himself, and on his own account, and that he alone was entitled to retain the same. The Plaintiff, on the other hand, alleged that the whole of the contracts were negotiated by *Ferrand* for account of himself and *the Plaintiff, and were part of the afore- [364 said transactions which the Plaintiff and *Ferrand* agreed to undertake for their joint benefit. The whole amount paid by the French Government in respect of all the contracts negotiated by the Defendant *Ferrand* was believed to be about two millions sterling, and the amount of commission paid to or claimed by *Ferrand*, and payable to him and the persons with whom he had shared the same, amounted to several hundred thousand pounds. The Defendants had in their possession, custody, or power the originals and copies of all letters and correspondence which had passed in relation to the contracts which had been entered into;

and from the contents of these letters and correspondence, and which the Defendants ought to set forth, it would fully appear that the Plaintiff was jointly interested with the Defendant *Ferrand* in obtaining the contracts and in the commission which the Defendants had received or claimed to receive thereon.

The bill prayed a declaration that all contracts for the supply of goods, stores, and provisions to or on behalf of the French Government effected by *Ferrand*, and in respect of which he was, or claimed to be, entitled to any commission, were effected by him for the joint benefit of the Plaintiff and himself, and that such commission belonged to the Plaintiff and himself in the proportion of 75 per cent. to the Plaintiff and 25 per cent. to the Defendant *Ferrand*. That an account might be taken of all sums received by the Defendant *Ferrand* in respect of such commissions, and that he might be ordered to repay to the Plaintiff three-fourths of such sums; that an account might be taken of all moneys received by *De Coulon & Co.*, in respect of such commission, and of all sums paid by them in respect thereof, and that out of the balance now in their hands the amount payable to the Plaintiff in respect of the said commission might be paid to the Plaintiff; and that in the meantime *De Coulon & Co.* might be restrained by injunction from paying any sum of money in their hands and representing commission on the aforesaid contracts to *Ferrand*, and that the same might be properly secured for the benefit of the Plaintiff.

A motion was now made on behalf of the Defendants, that all further proceedings in this cause might be stayed until seven days after the determination of the legal proceedings instituted 365] by the *Plaintiff against the Defendant *Ferrand* and now pending before the civil tribunal in *France*.

There was evidence that the Plaintiff had instituted proceedings in *Paris* against the Defendant *Ferrand* for the same accounts as those prayed for in this suit, on the 17th of August, 1871; that the Defendant *Ferrand* pleaded to the suit on the 23d of August; that on the last-mentioned day the Defendant *Ferrand* filed a cross suit against the Plaintiff, which was supplemented by a further plaint of *Ferrand* on the 5th of September. These proceedings were still pending.

Mr. *Pearson*, Q.C., and Mr. *Davey*, for the Defendants —

This is a bill to have a construction put upon a contract entered into in *France* between a Frenchman and an Englishman domiciled in *France*. Proceedings have already been instituted in *France* which will settle this question. The foreign Court is the proper tribunal to try the question, which is one of French law. This court can have no knowledge of what that law is unless through the evidence of foreign lawyers, and the Defendant *Ferrand*, who is the only party to the contract with the Plaintiff, is now in *France*, where the suit is proceeding. The Defendants *De Coulon & Co.*, although resident in *England*, are also foreigners; against them the relief prayed is an account of moneys received by them on another person's account, and that the amount due to the Plaintiff may be paid to him. These Defendants know nothing of the alleged contract; their dealings have been with *Ferrand*, and now they are told by the Plaintiff that he is a party to that contract, and is the principal person entitled to the money received by them, being entitled to three-fourths of the amount. It is impossible for this Court to put a construction upon the contract, and the convenience of all parties will be served by an order to stay any further proceedings in this suit until after the legal proceedings instituted by the Plaintiff against *Ferrand* in the civil tribunal of *France* shall have been brought to a termination. It would be an act of oppression if this Court were to act upon its own view of a foreign contract when the foreign Court is about to decide the question between the parties. In *Ostell* v. *LePage* (1), and on appeal (2) *the Court overruled a plea of a pending suit [366 in *India*. The Vice-Chancellor, however, intimated that if two suits for the same object were pending in Courts of concurrent jurisdiction, then the second suit would be vexatious, and the proper course would be to apply to stay proceedings in the second suit. But in *Jones* v. *Geddes* (1) an injunction was refused to restrain a party resident in *England* from prosecuting a suit in the Court of Sessions in *Scotland*, because the question, upon the whole, might be more conveniently litigated, and with a more conclusive result, there than here. This shows that the convenience of the tribunal and completeness of the relief is a

(1) 5 De G. & Sm., 95. (2) 2 D. M. & G., 892. (1) 1 Ph., 724.

matter of the greatest importance, and on that ground the present motion should be allowed.

[They also cited *Venning* v. *Loyd* (*)]

Mr. *Glasse*, Q.C., and Mr. *Robinson* for the Plaintiff, were not called upon.

Sir R. Malins, V.C.:—

This is a most unusual application. It is a motion that I should stay all proceedings in the cause, and put an end to the suit; that I am in fact to decide that none of the Defendants are bound to answer a single interrogatory to the bill. Now it requires a very clear case to sustain such a motion, and I never heard an application more unjustifable than this. The allegation is that there are large sums of money in which the Plaintiff is entitled to participate; but the bill only asks an account as *to* the particular sums which have found their way into the hands of the Defendants Messrs. *De Coulon & Co.*

The Defendants demur to the bill on the ground of convenience; then where is the convenience of this course?—that I am to stay all proceedings in the suit when it is plain that the object of the Defendants *De Coulon & Co.* is to play into the hands of *Ferrand*. These men are stakeholders, and the present motion is in the nature of a demurrer, and if any part of the bill requires an answer, the demurrer must fail. There may be ninety-nine interrogatories which the Defendants are not bound to answer; yet if there is one upon which the Plaintiff is entitled 367] to relief, the demurrer cannot *be sustained. So, in this case, there may be many of the interrogatories to which the Plaintiff cannot demand an answer, and which the Defendants are not legally bound to answer; but if there is any one question which they ought to answer, they cannot avoid doing so. What then becomes of the question of convenience? It is impossible for me to say when the proceedings instituted in the French Courts may be adjudicated upon, and I am asked that this suit may be stayed in the meantime, and that the Defendants may be exempted from putting in an answer. I must therefore look into the allegations, in the bill, which for this purpose must be taken to be true, to ascertain whether there is

(*) 1 D. F. & J., 193.

any portion requiring an answer. Now, there is an interrogatory which, I think, the Defendants are, at any rate, bound to answer, "Whether the Defendants *De Coulin & Co.* had not, and whether they have not now, a large sum of money in their hands, representing commissions paid by the French Government in respect of the said contracts?"

Suppose they say they have a large sum of money in their hands, then the question arises whether that money ought not to be brought into Court for safe custody. On principle this motion is totally unjustifiable and unsustainable, and it appears to me that the only object of the Defendants *De Coulin & Co.* is to help *Ferrand* as much as they can. They have been casting about to see how they could avoid giving an answer, and this is the only object of the motion.

I was told there were authorities which were conclusive upon the point; but upon looking at the cases cited I do not find one that is applicable to the circumstances of this case. Take the case of *Ostell* v. *Le Page* (1): the Plaintiff and Defendant had carried on business in partnership in *India* and in *England;* the Plaintiff resided in *England*, and the Defendant in *India;* the Plaintiff filed a bill in *Calcutta* against the Defendant for an account, and for an injunction and receiver. Pending that suit, the Defendant left *India* and came to reside permanently in this country; the bill filed in *India* was taken *pro confesso*, and a decree was made referring it to the master to take an account. The Plaintiff then filed a bill in this country, alleging that by reason of the absence of the Defendant from *India* the suit there could not be prosecuted, *and praying relief here similar [368 to that which was sought in the suit in *India*. The Defendant answered such parts of the bill as sought discovery of documents, but pleaded the existence of a decree of the Court in *India*, and the pendency of the proceedings before the Master there in bar of the substantial part of the Plaintiff's bill. That was a very strong case; but still the plea was overruled, and the decision was confirmed upon appeal. That was quite as much a foreign Court as this is. Here I am asked to stay proceedings on account of the pendency of a suit in *France*, when I have the decision of the Court of appeal in the case relied

(1) 5 De G. & Sm., 95; 2 D. M. & G., 892.

upon, which, instead of being in favor of the Defendants, is against them.

Then there is the case of *Elliott* v. *Lord Minto* (1). The Petitioner, who was the heir under a settlement made by *W. Elliott*, of a Scotch estate, filled a bill to have his estate exonerated from a heritable bond by the application of personal estate in *England*. The Vice-Chancellor said the question must be determined like every other question respecting real estate, by the law of the country where the real estate was situate, and could not depend upon the law of the country where the personal estate happened locally to be; that all this Court could do would be to refer it to the master to inquire what was the law of *Scotland* to be applied to the case, which could not be conveniently done in a complex case of equitable circumstances; and as it appeared that a suit and cross suit were already commenced in *Scotland*, the Court ordered the case to stand adjourned till the determination there.

That has no application to this case. There there was *one* Plaintiff and one Defendant. Here the object is to obtain discovery; in the other case the circumstances apply to a different state of things altogether.

This Plaintiff is entitled to an answer if he can get it from these Defendants, who are merchants carrying on business in this country.

I must refuse the motion with costs.

Solicitor for the Plaintiff: Mr. *Kearsey*.

Solicitors for the Defendants: Messrs. *Druce, Sons, & Jackson*.

V.-C.B. Jan. 19, 23, 28, 1872.

381] *ANDERSON v. ANDERSON.

[Law Reports, 13 Equity Cases, 381.]

[1869 A. 117.]

Will — Republication — 1 *Vict. c.* 26, *ss.* 15, 34.

Testatrix by her will gave a share of her residuary real and personal estate to *B.*, and one of the attesting witnesses to the will was *B.'s* wife. By a codicil,

(1) 6 Mad., 16.

which was attested by other witnesses, testatrix, after a direction to her executors to allow an extended time for payment of a debt due to her from one of her legatees, confirmed her will in other respects :—

Held, that the duly attested codicil had the effect of republishing and incorporating the will so as to render the gift to *B.* valid, notwithstanding attestation of the will by *B.*'s wife.

HANNAH ANDERSON, widow, by her will, dated the 10th of December, 1868, gave, devised, and bequeathed all the rest and *residue of her estate and effects whatsoever and where- [382
soever unto and to the use of her son *George Anderson* and *Henry Letts*, whom she appointed executors and trustees of her will, upon trust to sell or convert, call in, recover, and receive such parts as should not consist of money, and to divide the net residue (except the five houses thereinafter mentioned) into five equal parts, one of which fifths she bequeathed to each of her sons, *Edward Charles*, *Joseph*, *George*, *Thomas*, and the remaining fifth to her daughter *Charlotte Tolhurst*, for her sole and separate use.

As to the five excepted houses, three of which were freehold and two leasehold, the sale was to be postponed until after the death of her daughter *Charlotte*, unless an advantageous opportunity of disposing of them should occur. The net annual income of the houses, or the net annual interest of the produce of such parts as might from time to time be sold, was to be paid unto *Charlotte Tolhurst*, during her life, for her separate use, without power of anticipation ; after the death of *Charlotte*, testatrix directed the five houses, if not sold previously, to be sold, and the net produce, after payment of all expenses, to be divided into four parts, one part to be paid to *Edward Charles*, one to *Joseph*, one to *George*, and the remaining fourth to *Thomas Anderson*, to whom respectively she bequeathed the same.

The will was attested by *Jemima Fishenden* and *Hannah Anderson*, wife of *George Anderson*, the executor and legatee named therein. By a codicil to her will, dated the 22d of January, 1869, and duly attested by other witnesses, testatrix authorized her executors to allow her son *Thomas* such an extended time to pay what might be owing to her from him, and not bequeathed to him, as they should consider advisable, and confirmed her will in other respects.

A *caveat* having been entered on behalf of the Plaintiff, who was a son of the testatrix, but excluded from all benefit under

her will, against the grant of probate of this will and codicil, issue was joined in the probate proceedings, and on the 6th of November, 1869, when the cause came on to be heard in the Probate Court, the Judge, by his final decree, pronounced for the form and validity of the will and codicil, of which probate was granted on the 23d of November, 1869.

383] The case made by the bill was that as one of the attesting witnesses to the will was the wife of *George Anderson*, one of the legatees, all gifts of real and personal estate in favor of *George Anderson* were null and void, and the property therein comprised passed, as undisposed of, to the heir-at-law and next of kin respectively of the testatrix.

Mr. *Fry*, Q.C., and Mr. *Key*, for the Plaintiff, referred to sect. 15 of the *Wills Act* (1 Vict. c. 26), and contended that the codicil had not the effect of giving validity to the bequest to *George Anderson*.

Mr. *Willcock*, Q.C., and Mr. *F. T. White*, for Defendants, contended that the effect of the codicil, which was duly attested and expressly confirmed the will, was to republish and incorporate the will in the codicil, making the will operate precisely as if it was executed on the day of republication. By thus giving that which was *pro tanto* an unattested instrument the effect and validity of a duly attested testamentary instrument, the defect in the gift to *George Anderson* arising from his wife having been an attesting witness to the will, was cured, and he was entitled to his legacy.

The difficulties which had arisen in some of the cases of identifying the particular instrument referred to in the later and duly executed testamentary instrument, did not here occur, as the will and codicil had both been admitted to probate.

They cited *Habergham* v. *Vincent* (1); *Doe* v. *Walker* (2); *In re Earl's Trusts* (3); *Allen* v. *Maddock* (4); *In the Goods of Lady Truro* (5); 1 Vict. c. 26, ss. 15, 34.

Mr. *Fry*, in reply:—

Words of reference must be construed in their strict and pri-

(1) 2 Ves., 204, 228. (2) 12 M. & W., 591, 600.
(3) 4 K. & J., 673. (4) 11 Moo. P. C., 427. (5) Law Rep., 1 P. & D., 201.

mary sense, and when a codicil refers to a will, that must be a will which satisfies the requirements of the *Wills Act*: *Croker* v. *Marquis of Hertford* (1); *Wigram* on Wills (2). If there is no document legally satisfying the requirements of a will to which the codicil *can be held to refer, then, looking into the [384 extrinsic circumstances, papers purporting to be testamentary, though not so in the strict and primary sense, may be rendered valid by the duly attested codicil. But this rule of construction does not apply when the codicil purports to confirm as a will that which is not legally a will. For the purpose of seeing whether the will referred to is valid we are entitled to look at the attestation. Finding that, from the way in which the will has been attested, the gifts to *George Anderson* are rendered void, we say that the codicil has not the effect of curing the defect or rendering the particular gift valid.

Even if the decision of the Court should be against us we are entitled to our costs of obtaining the opinion of the Court upon a doubtful point of construction: *Thomason* v. *Moses* (3); *Lee* v. *Delane* (4); *Morgan* and *Davey* on Costs (5).

Jan. 27. Sir James Bacon, V.C.:—

The question which arises in this suit is, I believe, entirely novel; the subject to which it relates is unquestionably of great importance, involving, as it does, a very valuable provision in the *Statute of Wills*, by which the law as it previously existed has been greatly altered and improved. Before the statute any beneficial interest given by will to the persons by whom such will might be attested was null and void; but the attesting witnesses were not disqualified from proving, as witnesses, the due execution of the testamentary instrument: 25 Geo. 2, c. 6. The existing statute, keeping in view the principle of public policy which is obviously involved in the former law, has extended its operation; and by the 15th section it is enacted, "That if any person shall attest the execution of any will to whom, or to whose wife or husband, any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or

(1) 4 Moo. P. C., 339, 363. (2) Page 18.
(3) 5 Beav., 77. (4) 4 De G. & Sm., 1. (5) Page 67.

personal estate, shall be thereby given or made, such devise, legacy, &c., shall, so far and only as concerns such person attest-
385] ing the execution of such will, *or the wife or husband of such person, be utterly null and void; and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will." The Plaintiff's claim is founded upon that provision. [His Honor, after stating the case, continued:—] Upon this very simple state of facts the Plaintiff has contended that the provision of the statute to which I have referred applies in direct terms, and that by the effect of it all such interest as *George Anderson* would have taken under the will is forfeited, and the testatrix must be held to have died intestate as to so much of her estate as *George Anderson* would have taken according to the tenor of the will, if his wife had not been one of the attesting witnesses.

The Defendant, on the other hand, insists that the will and codicil together form one, and but one, testamentary instrument; and that the object and effect of the codicil was to repeat and confirm the bequests contained in the will; that its operation was to incorporate the will with the codicil; and that the latter instrument having been duly executed by the testatrix, and attested by unobjectionable witnesses, neither the letter nor the spirit of the statute is infringed; that all the requisites of the law are complied with; and that there is no foundation for the Plaintiff's suit.

Now, in order to decide the point which is raised, the first question to be solved is, what is the will of the testatrix? The statute (sect. 9) enacts that no will shall be valid unless it be in writing, signed or acknowledged by the testator in the presence of, and attested by, two witnesses. If the codicil in question can be held to be the will of the testator, these requisites are complied with. In the course of the argument reference was made to several cases, the most important of which, as well as the most recent, appears to be *Allen* v. *Maddock* (1), in which the testatrix, having made what purported to be a will, dated in December, 1851, but attested by one witness only, had afterwards, in September, 1856, executed a testamentary paper,

(1) 11 Moo. P. C., 427.

which was duly attested, and which commenced with the words, "This is a codicil to my last will and testament." The Court of Probate, being satisfied that* the instrument of 1851 [386 was the will which the testatrix referred to in the codicil, decreed probate of the two papers as together constituting the will of the testatrix; and it was from that decision that the appeal to the Privy Council was brought. The argument in that case principally turned upon the question, whether the codicil had sufficiently identified the paper of 1851, and it was contended that parol evidence of that fact, upon which the Court below had proceeded, was inadmissible for the purpose of proving such identity. No such point exists in the present case, because the two papers; will and codicil, having been together admitted to probate, the identity of the paper of 1851 with the will mentioned in that testatrix's codicil must be taken to be established. The Privy Council decided that the parol evidence was admissible, and that it proved satisfactorily the identity of the paper referred to in the codicil. But the greater value of this most valuable judgment is, that it decides in very express terms, and by reference to numerous authorities as well before as since the *Statute of Wills*, that the due execution by a testator of a codicil amounts to a republication of a former will, if the codicil refers to such former will, and that, without any regard to the fact whether or not the paper so referred to complied with the requirements of the law as to execution or attestation of such paper; and, referring to the alterations introduced by the existing statute, it pronounces that thereby "the ceremonies necessary to authenticate the instrument are altered; but no alteration is here made in the effect to be given to words used in it. It would seem that a paper which would have been incorporated in a will executed according to the *Statute of Frauds* must now be incorporated in a will executed according to the new Act." And their Lordships, referring to the case on Lord *Hertford's* testamentary papers (1), point out and adopt the distinction to be made since the new Act with respect to the unattested papers referred to, the identity of which was not clearly proved (2). With these authorities the law is too clear to admit of any doubt upon the single question raised. Sect. 24 enacts that a will shall be construed to speak

(1) 4 Moo. P. C., 339. (2) 11 Moo. P. C., 458.

from the death of the testator; and sect. 34 that the Act is not to extend to wills made before the 1st of January, 1838, "and 387] that every will re-executed or republished or revived *by any codicil shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived." It was much pressed in the argument on the part of the Plaintiff that the very existence of the will could not be proved, except by the persons who had attested it, and, therefore, that the evil which the statute sought to prevent would be admitted unless the legacy in question were declared to be forfeited. I do not know, and I have no right to inquire, upon what evidence the Court of Probate decided. But I am clearly of opinion that there is no reason to apprehend that, by treating the codicil duly attested as a republication and confirmation of the will, any relaxation of the wholesome provision of sec. 15 would be effected.

That in the execution and attestation of the codicil in question all the requisites of the statute were complied with is clear. None of the evils which the statute intended to prevent can arise; and it would be as much beyond the provisions and the contemplation of the statute, as it would be opposed to good sense and reason, to hold that the codicil, duly executed and attested, had not the effect of republishing the will, and making it a new and original disposition by the testatrix in January, 1869, of the estate which she had dealt with by the will of December, 1868. To hold otherwise would be to hold that any error in a will, once duly executed, could not be corrected but by an entirely new will, for which proposition there is no authority. It cannot be said that the testatrix could not have made a new will if she had been so minded. Suppose that, by the codicil, she had said, "I am aware that my will is so erroneously attested as that my son's legacy will be forfeited, and to prevent that I execute this codicil, and do thereby confirm my will." There can be no doubt that she was competent to do this up to the latest moment of her life. I am of opinion that she has done this by the duly executed codicil; that the whole contents of the previously existing will were incorporated in the codicil; and, therefore, that Plaintiff's bill must be dismissed.

Solicitors: Mr. *G. R. Longdon*; Mr. *J. Letts.*

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A

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AGENT.

1. The defendants, M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note addressed to the plaintiffs:—"We have this day sold for your account to our principal" so many tons of raisins. (Signed) "M. & W., brokers." The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action on the contract against the defend ants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personallyliable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London colonial market:—

Held, that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract, on the authority of *Humfrey* v. *Dale* (7 E. & B., 266; E. B. & E., 1004); and that the evidence of a similar custom in the colonial market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. *Fleet* v. *Murton*, 32

2. The defendant, a merchant in Liverpool, employed the plaintiffs, tallow brokers in London, to buy tallow for him in the London market.

In an action brought by the plaintiffs against the defendant to recover the loss upon the re-sale of the tallow, which the defendant had refused to accept, it was proved "That there exists an established custom in the London tallow-trade, for brokers, when they receive an order from a principal for the purchase of tallow to make a contract or contracts in their own names without disclosing their principals, and also to make such contracts either for the specific quantity of tallow so ordered, or to include such order with others they may have received in a contract for the entire quantity, or in any quantities, at their convenience, at the same time exchanging bought and sold notes with the selling brokers, and passing to their principals a bought-note for the specific quantity ordered by them; and that, when a broker so purchases in his own name, he is personally bound by the contract; and that, on the usual settling days, the brokers balance between themselves the purchases and sales so made, and make or receive deliveries to or from their

principals, as the case may be, or, if their principals refuse to accept or deliver, then to sell or buy against them, as the case may be, and charge them with the loss, if any, or, if delivery is not required on either side, then any difference which may arise from a rise or fall in the market is paid by the one to the other."

All the dealings between the plaintiffs and the defendant were carried out in accordance with the above custom, which, however, does not exist in Liverpool, and was unknown to the defendant:—

Held, by Kelly, C.B., Channell, B., and Blackburn, J., that the employment of the plaintiffs by the defendant was an employment to buy according to the usages of the London tallow-market, and that the defendant was bound by those usages, notwithstanding he was ignorant of their existence.

Held, by Mellor and Hannen, JJ., and Cleasby, B., that the plaintiffs, having been employed as brokers to make the contract for the defendant, and having professed to act as brokers, and charged brokerage for their services as such, were not entitled, as against a person unconnected with the London tallow-market and ignorant of its usages, to set up a custom or usage that they should fill a different character, and become themselves principals in the transaction instead of brokers. *Mollett* v. *Robinson*. 335

3. Two directors of *Company A.* were also directors of *Company B.*, and both companies employed the same solicitor. *Company A.* owed money to their contractor, which, however, was not payable immediately. The contractor had bought shares in the company and was pressed by the stock brokers for the money. *Company A.* agreed to advance him £7000, and borrowed the money from *Company B.* on the security of a mortgage. The loan was negotiated by one of the persons who was a director of both companies, and the solicitor who acted for both companies prepared the mortgage. *Company A.* had power under the articles to borrow money, but were not authorized to buy up their own shares. Both companies afterwards were wound up:—

Held (reversing the decision of *Malins*, V.C.), that *Company B.* were not affected by notice of any illegality in the purpose to which the money borrowed was to be applied, and that they were consequently entitled to prove against the estate of *Company A.* under the winding-up. *In re Marseilles Extension Railway.* 488

4. A jobber or dealer in shares on the *Stock Exchange* contracted to purchase the Plaintiff's shares in a company, and gave into the Plaintiff's brokers a ticket with the name of the intended transferee, which had been passed on to him. After the execution of the transfer it was discovered that the transferer was an infant, of which neither party was previously aware; and the Plaintiff became liable for calls. In a suit by the Plaintiff against the jobber, seeking to make him liable to indemnify him in respect of the shares:—

Held, that, as by the usage of the *stock Exchange* the jobber was, in the absence of fraud, discharged from liability when he had given the name of the transferee and paid for the shares, and as he had given all the further information required by the vendor, the suit against him could not be sustained. *Rennie* v. *Morris*. 651

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AGREEMENT.

1. The defendants' correspondents at Valparaiso bought on their account of S. & Co. 600 tons of nitrate of soda, and on the 16th of July, 1868, they chartered the bark *Precursor* to bring it to England, and they, on the same day wrote to the defendants of this. On the receipt of the advice, the defendants, on the 8th of September, made a contract, through brokers, with the plaintiff: "We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s.* 9*d.*, per cwt....Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the mean time, on the 13th of August, an earthquake had destroyed the greater part of the nitrate of soda while lying at the port of lading; and it having been determined by arbitration, pursuant to the contract, that S. & Co. were not bound

to supply other soda, on the 2d of September the Valparaiso house had cancelled the charter of the *Precursor*. Afterwards, on learning from the defendants that they had sold the nitrate of soda to arrive, but not on what terms, they purchased other 600 tons of nitrate of soda at above the defendants' limit, and obtained a transfer of a charter of the same bark *Precursor*, and shipped the nitrate about the 23d of December to the defendants, to enable them to execute their contract, if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on the 8th of May, 1869, and the plaintiff demanded the cargo under the contract of the 8th of September:—

Held, affirming the judgment of the Court of Queen's Bench, that the plaintiff was not entitled to the cargo. *Smith* v. *Myers*. 42

2. The defendant covenanted with the plaintiff not to carry on the business of a publican within half a mile of the plaintiff's premises. He afterwards carried on that business within half a mile, if the distance were measured in a straight line, "as the crow flies," but not within half a mile, if the distance were measured by the nearest mode of practicable access:—

Held (by Martin and Channell, BB., Cleasby, B., dissenting), that there had been a breach of the covenant. *Moufflet* v. *Cole*. 177 *note* 191

3. In an action on a bond, conditioned that the defendant should not "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise:"—

Held (by Bramwell and Pigott, BB.; Martin, B., doubting), that the condition of the bond was not broken by the defendant's entering into the service, as traveller, of a brewer. *Josselyn* v. *Parson*. 378

4. A bill stated that, by an indenture made between *A.*, of the first part, *B.*, of the second part, and the several other persons whose names and seals were, or were intended to be, thereunto subscribed as creditors of *A.*, of the third part, *A.* assigned all his personal estate to *B.*, upon trusts for the creditors of *A.*:—

Held, on demurrer (affirming the decision of the Master of the Rolls), that this was not an averment of the execution of the deed by any of the creditors:

5. *Held*, that the deed nevertheless would operate as an assignment of the personal estate, so as to enable *B.* to maintain a suit against a trustee to whom certain personal estate had been assigned in trust for *A.*; and that the creditors need not be parties to the suit. *Glegg* v. *Rees*. 432

6. An architect entered into an undertaking with his employer that a house should be erected for a sum not exceeding £15,000, including architect's commission and all expenses, and engaged the services of a builder who, without being informed of the undertaking, gave an estimate based on quantities given him by the architect, and entered into a contract with the employer for the completion of the work from the architect's plans, and under his superintendence, for £13,690, with power for the architect to order extra works, and with a clause providing that all questions between the parties under the contract should be settled by the award of the architect—on a suit by the builder claiming to be entitled to be paid by the employer for all quantities executed by him beyond those included in his estimate, and for extra works:—

Held, that the account was too complicated to be taken at law, and ought to be taken in this Court:—

7. *Held*, also, that on the evidence the architect was the agent of the employer; that his undertaking having been concealed from the builder; the arbitration clause in the contract could not be enforced; and that the Plaintiff was entitled to an account for what was due to him for any works executed by him under the architect's direction not included in the contract, and for any works so executed under the contract the price for which was not therein included, and for any variations made under the architect's direction of works included in the contract. *Kimberly* v. *Dick*. 511 *note* 532

8. An agreement (sanctioned by Act of Parliament) was entered into between two water companies, by which it was agreed that company *A.* should take over the works, provide for a mortgage debt, and pay interest upon the shares of company *B.* This agreement was sanctioned by Act of Parliament, and the transaction was

carried into effect by an indenture of January, 1857, which provided that if company *A.* (or their intended assignees, the Corporation or Local Board of Health), being desirous of becoming the absolute and unrestricted owners of the works of company *B.*, subject only to the mortgage debt, should, "on or before any 25th of December, after having given to company *B.* six months' previous notice of their desire to avail themselves of the option thereby given, pay unto company *B.*" £46,246, the amount of their share capital, the party so paying should become absolutely entitled to the works.

In June, 1870, the corporation who had acquired the interest of company *A.*, gave notice to company *B.* of their intention to pay the £46,246, on the 25th of December following, but they were unable, from want of funds, to carry out the purchase. In June, 1871, they again gave notice that they would pay the money on the 25th of December, 1871:—

Held, that the corporation, by giving the first notice and failing to act upon it, had not lost the right given to them by the deed of January, 1857, of purchasing, after six months' notice, on or before any 25th day of December. *Ward* v. *Wolverhampton Waterworks Co.* 658

See ARBITRATION, 87.
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See CARRIER, 126.

ARBITRATION.

1. The defendant, as broker, made a contract for the plaintiff, as follows:—"Oct. 26, 1869. Sold by order and for account of Mr. D. Pappa, to my principals, Messrs. S. H. & Son, to arrive, 500 tons Black Smyrna raisins—1869 growth—fair average quality in opinion of selling broker—to be delivered here in London—at 22*s.* per cwt. D. pd. Shipment, November or December, 1869," &c.:—

Held, that the defendant was in the nature of an arbritrator to determine between the parties any difference which might arise as to the quality of the raisins tendered in fulfilment of the contract; and, consequently, that he was not liable to an action for not having exercised reasonable care and skill in coming to a decision,—it being conceded that he had acted bona fide and to the best of his judgment.

Quære, whether the contract was satisfied by the tender of raisins *of* "fair average quality" generally, or whether it required that they should be of fair average quality of the growth of 1869? *Pappa* v. *Rose.* 87

2. How far an agreement that a third person shall determine the quality of goods is binding see. 87 *and note* 97

3. How far clause in contract for is binding. 532 *note.*

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How far clause for decision by is binding. 532 *note*

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B.

BANKRUPTCY.

1. A debtor executed as security for an antecedent debt of £1500, an assignment which included all his property of any appreciable value, except a pension of 10*s.* 6*d.* a day to which he was entitled as a retired servant of the *East India Company* :—
Held (affirming the order of *Bacon*, C.J.), that as this pension would not pass to a trustee in bankruptcy, and could not be taken in execution by a creditor, it constituted no substantial exception from the assignment, which, being an assignment of substantially the whole of the debtor's property, was an act of bankruptcy. *Ex parte Hawker*. 503

2. An execution creditor who has seized the goods of his debtor before the latter has committed an act of bankruptcy is entitled to the proceeds of them as against the trustee. Therefore where goods of a non-trading debtor were seized on the 18th of February, and the debtor filed a petition for liquidation on the 22d of February :—
Held, that the execution creditor was entitled to the proceeds of the execution.
The *Bankruptcy Act*, 1869, has no retrospective operation, and where it speaks of traders, it means such persons only as were traders at the time when it first came into operation.

3. Therefore where a person has ceased to trade in 1868, but in 1871 owed various debts contracted during the period he was in trade :—
Held, that he was not a trader within the meaning of the *Bankruptcy Act*, 1869. *In Re Bailey*. 703

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EXECUTORS AND ADMINISTRATORS, 468.
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BREACH OF PROMISE OF MARRIAGE.

1. The defendant promised to marry the plaintiff so soon as his (defendant's) father should die. During the father's lifetime the defendant refused absolutely to marry the plaintiff. The plaintiff sued for breach of the promise, the defendant's father being still alive.
Held, reversing the judgment of the Court below, that the principle of *Hochster* v. *De la Tour* (2 E. & B., 678 ; 22 L. J. (Q.B.), 455) was applicable to the case of such a promise to marry, and that a breach of contract had been committed on which the plaintiff could sue. *Frost* v. *Knight*. 218, *and note* 225

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C.

CARRIERS.

1. A valuable greyhound was delivered by its owner to the servants of a railway company, who were not common carriers of dogs, to be carried, and the fare demanded was paid. At the time of delivery the greyhound had on a leathern collar with a strap attached to it. In the course of the journey, it being necessary to remove the greyhound from one train to another which had not then come up, it was fastened by means of a strap and collar to an iron spout on the open platform of one of the company's stations, and, while so fastened it slipped its head from the collar and ran upon the line and was killed:—

Held, that the fastening the greyhound by the means furnished by the owner himself, which at the time appeared to be sufficient, was no evidence of negligence on the part of the company. *Richardson* v. *North Eastern Railway*. 126

2. There is a duty on the master of a ship, as representing the shipowner, to take reasonable care of the goods intrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incidents of the voyage, but also in taking active measures, where reasonably practicable under all the circumstances, to check and arrest the loss or deterioration resulting from accidents, for the necessary and immediate consequences of which the shipowner is not liable by reason of exceptions in the bill of lading. And for neglect of this duty by the master the shipowner is responsible to the shipper.

The plaintiffs shipped beans on board the defendants' ship, under a bill of lading, from Alexandria to Glasgow, with leave to call at intermediate ports, deliverable to plaintiff's order on payment of freight by consignees. The ship called at Liverpool, and in going out met with a collision (a peril excepted in the bill of lading), and was obliged to put back for repairs, which detained her a few days. The beans were wetted by sea water in consequence of the collision; and the plaintiffs, being at Liverpool, offered to receive them there, paying freight pro ratâ; but the defendants' agent refused to deliver them without being paid full freight; and the beans were carried on to Glasgow; and on their arrival there they were much deteriorated in value, beyond what they would have been by the mere wetting from the collision, if they had been dried instead of being carried on as they were. The beans might have been removed at Liverpool from the ship to warehouses and spread out and dried, and there was warehouse accomodation within half a mile of the dock in which the ship was; and by this means the decomposition would have been materially arrested or mitigated. The cost of unshipping, drying, and re-shipping, would have been particular average, payable by the shippers. The plaintiffs' brought an action against the defendants, claiming the amount of the extra depreciation. On a case disclosing the above facts, the court having power to draw inferences:—

Held (affirming the judgment of the Court of Queen's Bench), that the facts showed that the beans might have been taken out and dried (which was clearly a proper thing to do on behalf of the owners), and then reshipped, without unreasonably delaying the whole adventure; that it was, therefore, the master's duty to have done so, and consequently the defendants were liable. *Notara* v. *Henderson*. 269

Semble, that the measure of damages was the amount of extra depreciation in value in consequence of the neglect to dry the beans, after allowing the estimated expense of unshipping, drying, and reshipping. *Notara* v. *Henderson*. 269

See STOPPAGE IN TRANSITU, 148.

CASES OVERRULED, REVERSED AND CONSIDERED.

Blanchard's Trust 3 D. F. and J., 131, explained. 506
Case v. *Drosier*, 2 Keen 764, 5 My & Cr., 246, followed. 555
D'Almaine v. *Mosley*, 1 Drewry 629, considered. 621
Dunnage v. *White*, 1 Jac & Walk. 583, followed. 621
Earl of St. Germains v. *Crystal Palace Railway*, L. R. 11 Eq. 568, not followed. 670
Earlom v. *Saunders*, Amb. 240, distinguished. 533
Farhall v. *Farhall*, L. R., 7 Eq., 284 reversed. 468
Fletcher v. *Rylands*, 3 H. L., 330, distinguished. 14
Frost v. *Knight*, L. R., 5 Exchcq, 322, reversed. 218
Garrard v. *Lord Lauderdale*, 2 Russ & Myl. 451, discussed. 434
Graham, Exparte, 5 D. M. & G., 356, considered. 479
Hochester v. *De La Tour*, 2 Ell & B. 678, followed. 218
Humfrey v. *Dale*, 7 E. & B., 266, E. B. & E, 1004, discussed. 32
Kilvert's Trust L. R., 12 Eq. 183, reversed. 499
Owen v. *Homan*, 3 Mac & G., 378, considered. 479
Radford v. *Willis*, L. R., 12 Eq., 105, reversed. 415
Stuart v. *Crawley*, 2 Stark, 323, distinguished. 127

CHARGE.

See LEGACY, 611.
WILL, 555.

COLLATERAL.

See FRAUDS STATUTE OF, 68, 78, *note*

CONDONATION.

See DIVORCE, 241, 249, *note*.

CONTRACT.

See AGREEMENT.

CONTRIBUTION.

See GENERAL AVERAGE, 162.

CORPORATION.

1. A company was established for the working of two mines, with a nominal capital of 300,000*l*., divided into 12,000 shares of 25*l*. each. Difficulties arising as to the title to one of the mines, and the defendants, who had negotiated the purchases for the company, and were to receive 10,000*l*. from the vendor of each mine, and had received the 10,000*l*. upon the completion of the purchase of the other mine, having bought 400 shares in the market and not being prepared to take them up, applied to the company for assistance, and the latter advanced them 6500*l*. upon the defendants undertaking to return it in the event of the purchase of the second mine not being completed within three months. The shares were taken up, but the contract for the purchase of the mine ultimately went off. The directors then called upon the defendants to return the 6500*l*., and, after much negotiation, it was arranged that the defendants should transfer to the company the 400 shares (10*l*. paid up), in satisfaction and discharge of the claim of the company against them. This transaction took place in August, 1866; and in March, 1867, at a meeting of the shareholders it was agreed that the company should go into liquidation, and its business be transferred to a new company with a diminished capital and 10*l*. shares, the directors of the new company being the directors of the old one, and the shareholders in the old company being holders of share for share in the new one. A report of the directors was read, showing the reasons for the liquidation and transfer, and that the diminution of the capital was owing partly to the abandonment of the purchase of the second mine and partly to "shares forfeited for non-payment of calls." At this meeting an account was handed to each shareholder present, in which the sum of 4000*l*. was set down as the price of "shares cancelled;" and the account of the defendants in the company's ledger was credited with 4000*l*., as per shares forfeited account."

By the articles of association of the company the directors were prohibited from purchasing their own shares; but they had power to compromise debts due to them, and to forfeit shares for non-payment of calls:—

Held, that, assuming that the compromise with the defendants by the acceptance and cancellation of the 400 shares was ultrà vires of the directors, the subsequent conduct of the shareholders in assenting to the transfer of the old to the new company, with knowledge or the opportunity and means of knowing, if they thought proper to inquire, that such transfer was in part founded upon such cancellation, was a ratification and acquiescence in what the directors had done, and sustained a plea of accord and satisfaction to an action brought in 1870 against the defendants in the name of the old company for the recovery of the 6500*l.* advance.

2. To show assent and acquiescence in such a case, it is not necessary (or possible) to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the Court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunityand means of inquiry.

3. By one of the articles of association of a joint-stock company, it was provided that the company shall not, under any circumstances, purchase its own shares." The directors, having advanced money to the promoters of the company, to enable them to take up shares which they (the promoters) had bought, but for which they were unable to pay, agreed, by resolution, to abandon their claim to have the money returned, in consideration of 400 shares (upon which 10*l.* per share had been paid up) being given up to them to be cancelled:—

4. *Semble*, that this was a "purchase of shares" within the prohibition above mentioned. *Phosphate of Lime Co.* v. *Green.* 98

5. A foreign corporation, carrying on business in England, although not incorporated according to English law, may be sued as defendants in an English court, in respect of a cause of action which arose within the jurisdiction.

6. So *held*, on motion to set aside service of writ. *Newby* v. *Von Oppen.* 323

7. Service of a writ of summons on the head officer of an English branch of a foreign corporation carrying on business in England is good service, and it is not necessary to serve the process on the officer at head office abroad. *Newby* v. *Von Oppen.* 323

See AGENT, 490.
DIRECTORS, 567.

COURSE.

How run, 177, 191, *note.*

COUNSELLOR.

See NEGLIGENCE, 371, 376.

COVENANT.

1. By deed of July, 1853, after reciting a lease of the 10th of March, 1847, from E. F., to defendant, for the lives of A., B., and C., and the survivors or survivor of them, defendant conveyed the premises to plaintiffs, to hold for the lives of A., B., and C., and the survivors or survivor of them, defendant conveyed the premises to plaintiffs to hold for the lives of A., B., and C., and the survivors or survivor of them, and covenanted that the said lease of the 10th of March, 1847, is a good, valid, and subsisting lease in the law, for the lives of the said A., B., and C., and the survivors or survivor of them, and is not forfeited, surrendered, or become void or voidable." B. having died before July, 1853, plaintiffs sued defendant for a breach of the covenant:—

Held, affirming the judgment of the Court of Queen's Bench, that the mention of the three lives was mere matter of description, and that the covenant only amounted to a cove

nant that the lease was still subsisting, and not to an implied covenant that the three lives were still in existence. *Coates* v. *Collins*. 47

CREDITOR OF ESTATE.

See EXECUTORS AND ADMINISTRATORS, 468

CRIMINAL LAW.

1. The prosecutrix in an indictment for an indecent assault, which on the facts alleged amounted, in substance, to an attempt at rape, was asked in cross-examination whether she had not previously had connection with a man other than the prisoner, and denied it:—
Held, that she could not be contradicted. *Reg.* v. *Holmes*, 226, *note*, 230

2. A building, in 24 & 25 Vict. 97, s. 6, is not necessarily a finished structure.

3. An unfinished house, of which the walls were built and finished, the roof on and finished, a considerable part of the flooring laid, and the internal walls and ceilings prepared ready for plastering, *held*, to be a building within the meaning of the section. *Regina* v. *Manning*. 230

4. The prisoner, being pressed for payment of a debt, obtained further time to pay, by giving, as security, an I. O. U., purporting to be signed by himself and another, the signature of the latter being forged by the prisoner:—
Held, that the instrument was an "undertaking for the payment of money" within the meaning of 24 & 25 Vict. c. 98, s. 23. *Regina* v. *Chambers*. 233

5. Two prisoners were indicted, under 24 & 25 Vict. c. 97, s. 3, for feloniously setting fire to a shop "of and belonging to" one of the prisoners:—
Held, that the averment of property in the prisoner was an immaterial averment, which need not be proved; and that an intent to injure another person as owner might be proved in support of the indictment. *Regina* v. *Newboult*. 391

6. The prisoner's goods having been seized under warrants of execution of a county court, and being in the possession of the bailiff, the prisoner, with intent to deprive the bailiff, as he supposed, of his authority, and so defeat the execution, forcibly took the warrants from him:—
Held, that the prisoner was not guilty of larceny; but that he was guilty of taking the warrants for a fraudulent purpose within the meaning of 24 & 25 Vict. c. 96, s. 30. *Regina* v. *Bailey*, 394

7. Where two prisoners are indicted and tried together, one is not a competent witness for the other. *Regina* v. *Payne*. 396

8. The prosecutor and prisoner were out at night in separate punts, on a creek, in pursuit of wild fowl. The prisoner, who was jealous of any one going there to shoot, and had threatened to fire at birds notwithstanding other persons might be between him and them, discharged his gun from a distance of twenty-five yards towards the punt in which the prosecutor lay paddling. At that moment the prosecutor's punt slewed round, and the prosecutor was struck by some of the shot and seriously wounded, whereupon the prisoner rendered him help, assuring him that the injury was an accidental result of the slewing round of the punt. The night was light and the boat visible fifty yards off. No birds were in view. The two men had always been on good terms, and the gun was fired apparently with the intention of frightening the prosecutor away rather than that of hurting him. The prisoner was indicted for the felony of wounding with intent to do grievous bodily harm; but the jury, under 14 & 15 Vict. c. 19, s. 5, found him guilty of the misdemeanour of unlawfully wounding:—
Held, that "unlawful wounding" within the meaning of that section must be "malicious;" and that there was proof of malice, which justified the conviction of the prisoner. *Regina* v. *Ward*. 403, and *note*, 403

CUSTOM.

When evidence of, admissible and when not. 41, *note*
See AGENT, 32, 335, 651.

D.

DAMAGES.

See CARRIER, 269.
SHERIFF, 60.

DEATH, PRESUMPTION OF.

See LEGACY, 465, 467 *note*.

DEFAMATION.

See LIBEL, 1.

DE SON TORT.

See EXECUTORS AND ADMINISTRATORS, 192.

DEVISE.

When creates charge upon real estate, gives a fee. 211

See WILL,

DIRECTORS.

1. Directors of a company issuing a prospectus are bound to disclose every material fact; and if they do not they will be held liable to indemnify any person who takes shares from the company on the faith of the prospectus against any loss which may be occasioned to him by reason of such concealment, even although they may have believed that the concealment will be beneficial to the persons induced to take shares.

2. A fact which, if disclosed would have so discredited the company as to prevent its formation, is a material fact within the meaning of the foregoing proposition.

3. The estate of a deceased director is liable in equity in respect of such indemnity to the same extent as the director would have been if living.

4. A transferee of shares has no greater right to be indemnified by the directors in respect of their misconduct in issuing a prospectus than the original allottee would have had; and if the allottee would have been debarred of his remedy against the directors by laches, condonation, or otherwise, the transferee is also debarred of remedy. *Peek* v. *Gurney*. 567

See AGENT, 490.
CORPORATION, 98.

DISCOVERY.

1. Although, in considering whether the rule that a defendant who submits to give discovery must make full discovery is to be applied, the Court does not in general weigh nicely the materiality of the discovery sought; still, if the discovery is such as might be used for purposes prejudicial to the Defendant irrespective of the suit, the Court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing.

2. The Defendants in a suit to restrain infringement of trade-marks having sealed up certain parts of entries and letters admitted to relate to the matters in question in the cause, were ordered by the Duchy Court of *Lancaster* to unseal the names of customers, and of places, and the prices, forming parts of such entries, and to unseal the portions of letters and copies of letters which contained the names of the writers and of the persons to whom the letters which were copied were sent, and the places to and from which the letters were sent, and the description of the marks to be placed, or which had been placed, on the goods referred to in such letters:—

Held, on appeal, that the Defendants ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, inasmuch as such discovery might be used in a manner prejudicial to the Defendants in their trade, and was not likely to assist the Plaintiffs in making out their case at the hearing; but that the order of the Vice Chancellor was in other respects right. *Carver* v. *Pinto Leite*. 450

DISTANCE.

Measured as "crow flies" instead of by highways. 177, 191, *note.*

DISTRESS.

See LANDLORD AND TENANT, 26.

DIVORCE.

1. The husband petitioned the Court for a dissolution of his marriage, by reason of his wife's adultery. In her answer the wife denied such adultery and made counter charges against the petitioner, of adultery and cruelty, which he denied, and directions were given as to the mode of trial of the facts in issue. The petitioner then moved for leave to withdraw the petition on payment of the wife's costs. A few days before the motion was made, the respondent filed a petition for alimony:—

Held, that, if a wife use due diligence in claiming alimony, the husband will not be allowed to withdraw his petition until he has paid the alimony allotted to her up to the time of the withdrawal; but that if the wife delay to present her petition up to the last moment, so that the husband has not had time to answer it, the Court will not refuse to allow him to withdraw, until he has filed an answer to such petition, and paid what the Court may allot upon it. *Twisleton* v. *Twisleton.* 260

2. A wife knowing that her husband, had been guilty of incestuous adultery with her sister, signed an agreement that she would forgive him, and would not take proceedings against him on account of such incestuous adultery, in consideration of his retirement from a then subsisting partnership in business with her father and brother. It was further agreed that they should not live together, but that they should see each other from time to time. The agreement also contained this clause: "The agreement or contract binds me (the wife) only so long as you remain true to me in love and duty." After the date of the agreement the husband was guilty of adultery, but not of incestuous adultery. The Court held that this subsequent adultery restored to the wife her right to have the marriage dissolved on the ground of the previous incestuous adultery.

3. Condoned incestuous adultery is revived by subsequent adultery not incestuous. *Newsome* v. *Newsome.* 241 and *note*, 249

E.

EASEMENT.

See TRESPASS, 51.

ELECTION.

See AGREEMENT, 658.

ENGINEER.

How far clause for decision by binding, 532, *note*

ENTITLED.

Sometimes in sense of "entitled to possession," 691

ESTATES IN TAIL.

See WILL, 555.

ESTOPPEL.

See SHERIFF, 60.

EVIDENCE.

See CORPORATION, 98.
CRIMINAL LAW, 226, 230, *note*, 260.
WILL, 249, 260, *note.*

EXECUTION OF INSTRUMENT.

See AGREEMENT, 432.

EXECUTOR AND ADMINISTRATOR.

1. The executor of an executrix *de son tort* is not liable for a breach of contract committed by the person with whose property the executrix *de son tort* has intermeddled. *Wilson* v. *Hodson.* 192

2. The executrix of a testator kept an executorship account with a bank, and having a power, under the will, to mortgage the real estate in aid of the personalty, she deposited with the bank the title-deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix, and the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against the testator's estate for the difference:—

Held (reversing the decision of *Bacon*, V.C.), that they were not entitled to prove; for that a person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets. *Farhall* v. *Farhall.* 468

3. If a legacy be in the first instance payable out of the personalty if that be insufficient out of the realty, the latter cannot be charged if the representative have wasted sufficient to pay the legacy. *Richardson* v. *Morton.* 611

See DIRECTORS, 567.
TRUST, 538.
WILL, 240.

F.

FALSE RETURN.

See SHERIFF, 60

FEE.

When charge upon real estate devised gives, 211.

FIRE INSURANCE.

See INSURANCE, FIRE.

FOREIGN CORPORATION.

See CORPORATION, 323.

FOREIGN SUIT.

See FORMER SUIT, 724.

FORGERY.

See CRIMINAL LAW, 233.

FORMER SUIT.

1. *A.*, an Englishman domiciled in *France*, entered into a contract in *France* with *B.*, a Frenchman, for carrying out jointly certain mercantile undertakings. In the course of the transactions large sums of money came into the hands of *C.* and *D.*, foreign merchants in business in *London*. *A.* filed a bill against *B.*, *C.*, and *D.*, alleging that, under the contract with *B.*, he was entitled to participate in the profits of the undertaking, and praying for an account from *C.* and *D.*, of the money in their hands, and that they might be restrained from handing it over to *B.* The Defendants moved to stay all further proceedings in the suit pending certain proceedings in the French Courts instituted by *A.* against *B.*, in which a construction would be put upon the French contract:—

Held, that there being portions of the relief sought, as to which the Defendants were bound to answer, the motion, which was in the nature of a demurrer, could not be sustained, and must be refused with costs. *Wilson* v. *Ferrand.* 724

FRAUD.

See DIRECTORS, 567.
INSURANCE, MARINE, 120, 328.
SALE, 140, 148, *note*.
STOCKHOLDERS, 567, 611, *note*.
STOPPAGE IN TRANSITU, 148.
TRUSTEE, 460.

FRAUDS, STATUTE OF.

1. The plaintiff had been employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed the board gave notice, under 11 & 12 Vict. c. 63, s. 69, to the occupiers of the adjoining houses, to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had expired, the plaintiff, having completed the sewer, was about to leave the place with his carts, &c., when the defendant sent after him, and the following conversation took place. The defendant said, "What objection have you to making the connections?" The plaintiff replied, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant replied, "Go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the board; and sent in the account to the board debiting them with the amount. The board refused payment on the ground that they had not authorized the order; and after more than two years, the account being still unpaid, the plaintiff made a claim and brought an action against the defendant.

2. The above evidence having been given by the plaintiff, the defendant denied that any conversation of the kind deposed to ever took place; the jury found that it did take place, and a verdict passed for the plaintiff, leave being reserved to enter a nonsuit.

3. The Court of Queen's Bench made the rule absolute to enter a nonsuit, on the ground that the conversation did not amount to an undertaking of the defendant to be primarily liable for the work; but only to a promise that if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not, and that this was a promise to be answerable for the debt of another person within s. 4 of the Statute of Frauds, and not being in writing could not be enforced. On appeal:—

The Court of Exchequer Chamber reversed the judgment, on the ground that there was evidence on which the jury might have found that the defendant agreed to be primarily liable. *Mountstephen* v. *Lakeman*. 68

4. When promise is collateral and when not. *note*, 78.

The plaintiff, on the 11th of January, 1871, bought of the defendant a parcel of wool worth more than 10*l*., "the whole to be cleared in about twenty-one days." A memorandum of the terms of the bargain was handed by the plaintiff to the defendant. On the 8th of February the defendant wrote: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off, as you have not completed your part of the contract." The plaintiff had, in fact, completed his part on the true construction of the contract. On the 9th of February, in answer to the plaintiff's request to see a copy of the contract contained in the memorandum of the 11th of January, defendant wrote in these terms, inclosing a copy: "I beg to enclose copy of your *letter* of the 11th of January:"—

Held, that the letter of the 9th of February, with its inclosure, taken in connection with that of the 8th, constituted an unambiguous recognition of the existence of the contract and of its terms; and that there was therefore a sufficient memorandum in writing signed by the defendant to satisfy the Statute of Frauds, s. 17. *Buxton* v. *Rust*. 135

5. A bill for specific performance alleged a verbal agreement for the lease of a house by the Plaintiff to the Defendant for seven years from Michaelmas, 1870, followed, first, by a letter from the Defendant to the Plaintiff, which did not state when the term was to commence, and, secondly, by

another letter of the Defendant to the Plaintiff, in which, after referring to the previous letter, the Defendant stated that he thought it best to say that it was clearly understood on his part, that the Plaintiff agreed to let the house for seven years from Michaelmas, 1870, upon certain conditions therein mentioned, some of which the Plaintiff did not admit to form part of the alleged verbal agreement:—

Held, that neither the first letter, nor the two together, constituted a memorandum in writing of the alleged agreement sufficient to satisfy the requirements of the Statute of Frauds. *Nesham* v. *Selby*. 640

G.

GAS COMPANY.

See NEGLIGENCE, 202, 204, *note*.

GENERAL AVERAGE.

1. The plaintiff's ship sailed from Melbourne for London, having on board (as is usual with sailing vessels on this voyage) a donkey-engine, which was equivalent to ten additional men, and without which (or the ten additional men) she would not have been seaworthy. The engine was used for pumping and also for other ship's purposes. The ship had on board a sufficient stock of coals for an ordinary voyage, and was expressly found to be seaworthy. On the 10th of March she encountered bad weather, which continued till the 1st of April, and then moderated. During this time she strained, and made much water, and she continued afterwards to leak; the water could only be kept under by pumping, and for this purpose it was necessary to use the engine, without which she could not have been kept afloat.

On the 16th of April the stock of coals was reduced to one and a half tons, and the captain, in order to obtain fuel, directed some spare spars and wood, which were part of the ship's stores, to be cut up to burn with the coal; wood alone would not have sufficed to get up the steam. On the 5th of May the ship obtained some coal from a passing vessel, and on the 16th put into port to obtain a further supply. On arriving in the Thames the engine broke down from overwork.

The ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine.

The plaintiff claimed from the defendants, who were owners of cargo, a general average contribution in respect of, 1. The spars and wood; 2. The extra coal; and, 3. The injury to the donkey-engine:—

Held, by Kelly, C.B., and Bramwell, B., that the facts showed an imminent peril requiring the sacrifice of the spars and wood, and that the plaintiff was therefore entitled to a general average contribution in respect of them; but that he was not so entitled in respect of the coal or the injury to the donkey-engine.

By Martin and Cleasby, B.B., that no such emergency had occurred as to entitle the plaintiff to a general average contribution in respect of any of the above matters. *Harrison* v. *Bank of Australasia*. 162

GOODS SOLD.

See SALE, 204.

GOODWILL.

1. The vendor of a business and the goodwill thereof may, in the absence of express stipulation to the contrary, set up a business of the same kind either in the same neighborhood or elsewhere, and may publicly advertise the fact of his having done so; but he must not solicit the customers of the old business to cease dealing with the purchaser, or to give their custom to himself. *Labouchere* v. *Dawson*. 711

GUARDIAN, TESTAMENTARY.

See WILL, 538.

H.

HIGHWAY.

See TRESPASS, 51.

HOUSE.

See CRIMINAL LAW. 230.

HUSBAND AND WIFE.

See MARRIED WOMAN, 262, 426.
WILL, 415, 626.

I.

IGNORANCE OF LAW.

See NEGLIGENCE, 371, 381.

IMPEACHMENT OF WITNESS.

See CRIMINAL LAW, 226, 230 *note*

INDEMNITY.

See DIRECTORS, 567.
LANDLORD & TENANT, 195.
LEASE, 207.

INDICTMENT.

See CRIMINAL LAW, 391.

INFANT.

See AGENT, 651.

INJUNCTION.

1. The Court will not, for the purpose of enforcing the lien of an unpaid vendor against a railway company for his purchase and compensation money, interest, and costs, restrain the company from running trains or engines over the land until the sale (directed by the order) of the land agreed to be taken. *Lycett* v. *Stafford &c., Railway.* 670

2. There is no presumption in law in favor of the validity of a patent, and therefore a patentee is not entitled to publish statements of his intention to institute legal proceedings, in order to deter persons from purchasing alleged infringements of his patent, if he has no *bonâ fide* intention to follow up his threats by taking such proceedings, and the Court will in such case restrain him from making such publication.

3. A person alleging the invalidity of a patent is not bound to assert his claim by *scire facias*, in order to establish his right to restrain the publication of statements by the patentee, threatening with legal proceedings persons buying articles of his manufacture alleged to be infringements of the patent. *Rollins* v. *Hinks.* 716

See TRADE MARKS, 474.

INSURANCE, FIRE.

1. A policy of fire insurance expressed the insurance to be on "merchandize the assured's own, in trust or on commission for which they are responsible in or on certain specified warehouses, vaults, wharves, &c. Whilst the policy was in force, certain chests of tea, on a wharf included in the policy, were destroyed by fire. These teas had been deposited in bond by the importer with the wharfinger; the assured had purchased them from the importer, and the warrants had been indorsed in blank by him to the assured. Before the fire occurred the assured had resold the teas in specified chests to customers, and had been paid for them; they held, however, the warrants on behalf of the customers, but merely for the convenience of paying, if required, the charges necessary for clearing the teas payable by such customers:—

Held, that the policy applied only to goods belonging to the assured, or

for which they were responsible, and the property in the teas having, at the time of the fire, passed to the purchasers, they were then at the purchasers' risk, and were consequently not covered by the policy. *North British and Mercantile Insurance Company* v. *Moffat.* 80

INSURANCE, MARINE.

1. On effecting an insurance on freight from Belize to R. Point on the Honduras coast (a place the exact locality of which was not known to either party) and thence to London, the agent of the assured produced and read to the agent of the assurers a letter which the owners of the vessel had received from the captain from Belize, in which R. Point was thus described:—"It is considered by the pilot here as a good and safe anchorage, and well sheletered. I have been out and seen the place, and consider it quite safe." It was admitted that this statement of the captain was made bonâ fide; but there was evidence that R. Point was not at the particular season a safe anchorage.

In an action upon the policy, for a total loss, the judge told the jury that in his opinion the letter did not amount to a statement of a fact, but merely of an opinion; and he left two questions to them,—1. Was the letter read to D., the agent of the assured? 2. Did the captain and the pilot consider that R. Point was a safe anchorage? The jury answered both questions in the affirmative, and a verdict was entered for the plaintiff:—

Held, no misdirection, and that the verdict was warranted by the evidence. *Anderson* v. *Pacific Fire and Marine Ins. Co.* 120

2. Where underwriters have (as by initiating a slip) made a contract of assurance, which, although invalid at law and in equity for want of statutory requisites, is nevertheless, in practice, and according to the usage of those engaged in marine insurance, a complete and final contract binding upon them in honor and good faith whatever events may subsequently happen, the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed. *Cory* v. *Patton.* 328

3. The plaintiffs, J. & Son, were lightermen, and effected an insurance in the form of an ordinary Lloyd's policy, at and from all wharves on the Thames, from Wandsworth to the Victoria Docks, which contained the following clause:—

"To cover and include all losses, damages, and accidents amounting to 20*l.* or upwards in each craft, to goods carried by J. & Son as lightermen, or delivered to them to be waterborne, either in their own or other craft, and for which losses, damages, and accidents J. & Son may be liable or responsible to the owners thereof, or others interested." The policy was subscribed by different underwriters for different sums amounting to 2000*l.*, and the defendants underwrote the policy for 100*l.* A loss happened to goods carried by the plaintiffs in a barge, for which the plaintiffs became liable to those interested in the goods to the amount of 1100*l.* The total value of the risks of the plaintiffs in this and other barges at the time of the loss and covered by the policy amounted to 20,000*l.*:—

Held, that, on the construction of the policy, the plaintiffs were entitled to be indemnified for the loss actually sustained, viz., 1100*l.*, and to recover from the defendant 55*l.*, his proportion; and that the sum to be recovered was not merely such a proportion of the plaintiff's loss as the sum *for* which the defendant subscribed the policy, viz., 100*l.*, bore to the value of all the goods afloat and covered by the policy at the time of the loss, viz., 20,000*l.* *Joyce* v. *Kennard.* 17

INTEREST.

See WILL, 419.

J.

JOINT TENANCY.

See WILL, 537.

JURISDICTION.

See CORPORATION, 323.

L.

LACHES.

See DIRECTORS, 567.
TRUST, 588.

LAKE.

See TRESPASS, 51

LANDLORD AND TENANT.

1. The plaintiff was tenant and the defendant landlord of a house occupied by the former, his wife, and a trustee. Goods therein had been assigned to the trustee on trust for the plaintiff's wife. Rent being in arrear to the amount of 9*l.* only, the defendant, by his bailiff, distrained for 18*l.* and costs, seizing 100*l.* worth of the goods. The rent actually due was tendered to the bailiff, with expenses, but refused, and he remained in possession until an undertaking was given on behalf of the plaintiff for payment of the whole demand, and a part amounting to 2*l.* 7*s.* was paid, whereupon the distress was withdrawn.

The plaintiff having brought an action for an excessive distress, and on the money counts, was nonsuited when the deed of assignment was produced at the trial:—

Held, that, although he was neither the legal nor the equitable owner of the goods distrained, yet he had, from his mere enjoyment of the use of them, a special property which entitled him to maintain the action. *Fell* v. *Whitaker*. 26

2. The plaintiff was tenant to L. of a farm from Michaelmas, 1858, for seven, fourteen, or twenty-one years, at tenant's option, at a rent of £80 a year, payable quarterly. In March, 1869, he purported, by an agreement not under seal, to assign the residue of his interest to the defendant, who entered and occupied the farm; but L. withholding his license, which was necessary under the plaintiff's lease, no actual legal assignment was ever executed. At Michaelmas, 1870, the defendant quitted the farm, having given L. a notice of his intention to do so. He might have continued to occupy if he had thought proper, but in fact the property stood empty after Michaelmas. The defendant, whilst in occupation, paid rent to L. for the plaintiff. He never was accepted as tenant by L. In March, 1871, the plaintiff paid L., in respect of rent due from the September previous, the sum of £40, which he now sought to recover from the defendant, either upon an implied indemnity, or by way of rent, or for use and occupation:—

Held, that he was not entitled to recover, there not having been under the circumstances any promise to indemnify the plaintiff against rent accruing after the defendant's actual occupation had ceased, nor any such relation of landlord and tenant existing between the parties as would entitle the plaintiff to the repayment by the defendant, either as rent or compensation for use and occupation, of the sum paid to L., by the plaintiff. *Crouch* v. *Tregonning*. 195

LARCENY.

See CRIMINAL LAW, 394.

LAW, IGNORANCE OF.

See NEGLIGENCE, 371, 381.

LEASE.

1. An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy; and that obligation is not affected by the covenants which the assignee may have made with his immediate assignor. *Moule* v. *Garrett*. 207

2. The plaintiff was lessee of certain premises under a lease containing a covenant to keep in repair. He assigned the lease to B., who assigned it to the defendants. The assign-

ment from the plaintiff to B., and from B. to the defendants, contained express covenants with the immediate assignors respectively, to indemnify them against all subsequent breaches. Whilst the defendants were in possession they committed breaches of the covenant to keep in repair, in respect of which the lessor recovered damages from the plaintiff. In an action to recover over these damages against the defendants:—

Held, affirming the judgment of the Court below, that the plaintiff was entitled to succeed. *Moule* v. *Garrett*. 207

See COVENANT, 47.

LEASE, ASSIGNMENT OF.

See LANDLORD AND TENANT, 195.

LEGACY.

1. A testator gave a legacy to be equally divided, within twelve months, between the children of *W. P.* who should be living at his, the testator's, death, such sum to be raised out of the property thereinafter given to his executrix for life. He then gave to his executrix certain real and personal estate for her life, and after her death to the children of *W. P.* living at his, the testator's, death. At the testator's death in January, 1847, there were four children of *W. P.* living, but another, *J. T. P.*, had not been heard of since February, 1845, and nothing ever was heard of him afterwards. The executrix paid to the four children, who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, and in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of the lunatic and the children of *W. P.* and the income was ordered to be applied for her benefit. In 1871 the four surviving children of *W. P.* and the administrator of *J. T. P.* petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of *J. T. P.*:—

Held, that, there being no proof that *J. T. P.* survived the testator, the share must be paid to the four children who were known to have survived him; that the manner in which the Court had dealt with the fund took the case out of the statute as to the principal, but that only six years' arrears of interest should be given. *In re Walker*. 465, *note*, 467

2. Where a legacy to an infant with interest for maintenance till twenty-one, was charged on testator's real estate, if the personal estate should be inadequate, and the personal estate was sufficient for all the purposes of the will at the time of the testator's death, but was subsequently wasted by the testator's personal representative:—

Held, that the legacy could not, on the infant attaining twenty-one, be made chargeable on the real estate. *Richardson* v. *Morton*. 611

3. A fund was devisible under the *Statute of Distributions* among grandchildren and great-grandchildren, claiming by two lines of descent from their common ancestor:—

Held, that the fund must be divided into moieties; and each moiety subdivided between the respective descendants *per stirpes* and not *per capita*. *In re Ross's Trust*. 683

See WILL, 409, 419, 499, 619, 635, 664.

LEGATEE.

When death of, confers right on representative. 635

When misdescribed or misnamed. 249, 260, *note*.

LEGITIMACY.

See WILL. 538

LETTER.

See FRAUDS, STATUTE OF, 135, 138

LIBEL.

1. Declaration, that the plaintiffs were manufacturers of bags, and manufac-

tured a bag which they called the "Bag of Bags," and the defendant printed and published, concerning the plaintiffs in their business, the words following:—"As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar; and which has been forced upon the notice of the public ad nauseam:"—

Held, on demurrer, by Mellor and Hannen, J.J., that it was a question for the jury whether the words did not convey an imputation on the plaintiffs' conduct in their business, and whether the language went beyond the limits of fair criticism.

By Lush, J., that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business. *Jenner* v. *A'Beckett*. 1

See INJUNCTION, 716.

LIEN.

See INJUNCTION, 670.
MORTGAGE, 437.

LIMITATIONS, STATUTE OF.

1. *L.*, in 1846, promised to pay, three months after date, to *B.* or to *C.*, his wife, the sum of £500. *B.* died in 1863, leaving *C.* surviving. There was an indorsement on the note in *L.'s* handwriting of his name and the year 1866. *C.* died in 1868:—

Held, that it was not intended to make a new note, and that there was a sufficient acknowledgement to exclude the Statute of Limitations. *Bourdin* v. *Greenwood*. 677

See LEGACY, 465.
WILL, 419, 422, *note*.

LINE.

How measured, . 177, 191, *note*

LUNATIC.

1. A person of unsound mind, not found so by inquisition, was kept by her brothers in a private asylum from 1838 to 1859, at a total expense of more than £700. The brothers having suffered losses in trade, and being unable further to support her, she was kept in a county asylum, at the expense of the county, from 1859 to 1871, the total expense exceeding £300. In 1871 a legacy was paid to her brothers, which by a will was directed to be paid to them to be applied for her benefit. This legacy was ordered to be retained by the brothers for her past maintenance in preference to the claims of the county, the brothers undertaking to maintain her in future; and, *semble*, they would, even without giving this undertaking, have been entitled so to be repaid for past maintenance.
In re Gibson. 423 and *note* 426

2. A gentleman entered into an arrangement by letter with the land agent who acted for the committee of a lunatic's estate, to take a lease of part of the estate for a term of three years. No formal agreement was entered into, nor was the sanction of the Master in Lunacy applied for, but the tenant was let into possession, and expended a considerable sum in repairs and improvements. After he had been nearly eighteen months in possession, the committee gave him six months' notice to quit, upon which he applied by Petition to have the terms of his arrangement with the agent carried into effect:—

Held, that the Court had jurisdiction to make an order giving effect to that arrangement; and order accordingly. *In re Wynne*. 508

M.

MACHINERY.

See MASTER AND SERVANT, 381.

MAINTENANCE OF CHILDREN.

Allowance for past 423, 426 *note*

MALICE.

See CRIMINAL LAW, 403, 408 *note*.

MARINE INSURANCE.

See INSURANCE MARINE.

MARRIED WOMAN.

1. A married woman had property, freehold and leasehold, devised to her separate use, and she being desirous of building and repairing some cottages upon it, and her husband wishing to pay off a debt, it was arranged, under the advice of the defendant, a solicitor, that a loan of 550*l*. should be raised by the mortgage of the wife's property, and the deposit of two policies of 500*l*. each on the life of the husband and wife respectively. The mortgage was executed by husband and wife, and the husband covenanted for the repayment of the loan. The money was to be advanced by installments, and a joint authority, signed by husband and wife, was given to the defendant to receive the first installment of 150*l*. from the mortgagees. He received it, and paid the husband's debt by the authority of husband and wife, and he handed a small sum to them, but claimed to retain the balance for a previous debt due from the husband for professional services. Upon this an action was brought by husband and wife to recover the balance:—

Held, that the action was maintainable: for that the defendant, having full knowledge of the objects of the loan, one of which was to appropriate a sum to the separate use of the wife, received the money under the joint authority, as agent of the husband and wife to carry into effect those objects; and he could not, against their will, treat the transaction as a reduction into possession by the husband, and the defendant, therefore, had no right to set up as an answer to the action that the money, when in his hands, was money of the husband alone. *Jones* v. *Cuthbertson*. 262

2. By a deed of separation made between a husband and a wife and trustees, and duly acknowledged by the wife, it was agreed that the wife should hold all the real and personal estate of the husband and wife, or either of them in right of the wife, as her separate property, and should have power, by will, to devise or bequeath the same. The husband then purported to convey to a trustee all such real and personal estate, to be held upon corresponding trusts:—

Held, that though the wife did not expressly convey real estate vested in her, it was the intention of the deed that she should have power to dispose thereof as if she was unmarried, and accordingly that a certain estate of which a trustee was seized in trust for her separate use during her life, with remainder to herself in fee, passed by her will.

3. A married woman may pass her separate real estate by deed or will as a *feme sole*. *Pride* v. *Bubb*. 426

See WILL, 415.

MARSHALLING SECURITIES.

See PRINCIPAL AND SURETY, 630

MASTER AND SERVANT.

See NEGLIGENCE, 381.

MISREPRESENTATION.

See FRAUD.

MONEY PAID.

See LANDLORD AND TENANT, 195.

MORTGAGE.

1. The solicitor of two mortgagees put up for sale by auction, without any authority, the mortgaged estate. He professed to have bought the estate, and prepared a conveyance which purported to be made by the second mortgagee under his power of sale. The mortgagees both executed the

conveyance, and also signed indorsed receipts for money as paid to them, though no money was in fact paid to them. The solicitor took possession of the estate and continued to pay the interest to the mortgagees, and afterwards made an equitable mortgage of the estate, representing it to be his own and unincumbered. As to the first mortgagee, there was evidence that he was deceived by the solicitor; as to the second mortgagee, there was evidence that he trusted the solicitor implicitly. There were inconsistencies on the plans upon the different deeds, and the solicitor had attested some of the prior deeds:—

Held (affirming the decree of *Malins*, V.C.), that, under the circumstances, the equitable mortgagee had priority over the second mortgagee:

2. *Held*, that the inconsistencies in the plans and the attestation by the solicitor did not put the equitable mortgagee on inquiry so as to fix him with constructive notice. *Hunter* v. *Walters*. 437

N.

NAVIGATION.

See TRESPASS, 51.

NEGLIGENCE.

1. Declaration, that the defendant was possessed of yew trees, the clippings off which he knew to be poisonous, and that it was the duty of the defendant to prevent the clippings from being placed on land not occupied by him: that the defendant took so little care of the clippings that the same were placed upon land not occupied by him, whereby the horses of the plaintiff were poisoned:—

Held, on demurrer, that the declaration disclosed no facts from which a duty could be inferred in the defendant to take care of the clippings. *Wilson* v. *Newberry*. 14

2. The defendants, a gas company, contracted to supply the plaintiff with a proper service pipe to convey gas from the main outside to a meter inside his premises. Gas escaped from the pipe laid down under the contract into the plaintiff's shop. The servant of a gasfitter employed by the plaintiff happened to be at work in another room at the time of the escape, and went into the shop upon hearing of it with a view of finding out its cause. He was carrying a lighted candle in his hand, and immediately on entering the shop an explosion took place, doing damage to the plaintiff's stock and premises. On the trial of an action against the defendants for their breach of contract in not supplying a proper service pipe, the jury found, first, that the escape of gas was occasioned by a defect in the pipe, and that that defect existed in the pipe when supplied; and, secondly, that there was negligence on the part of the gasfitter's servant in carrying a lighted candle. Upon these findings:—

Held, affirming the judgment of the Court below, that the plaintiff was entitled to recover, and that the defendants were not relieved from liability by the negligent act of the gasfitter's servant. *Burrows* v. *March Gas and Coke Company*. 202, and *note*, 204

3. The defendant's canal was constructed under an Act of Parliament, by which the canal was to be open for use by the public on payment of tolls. Defendants were authorized to take land compulsorily and construct the canal, doing as little damage as might be, and to do all things necessary for making and preserving and using the canal, making satisfaction for all damages to be sustained by the owners of lands and hereditaments taken or prejudiced by the execution of the powers of the Act. Commissioners were appointed who were to determine from time to time what sum should be paid for the purchase of lands, and also to determine what other distinct sum should be paid by defendants as recompense for any damages which might be at any time whatsoever sustained by owners of lands or hereditaments by reason of the making or maintaining the canal. The minerals under the canal were expressly reserved to the owners, who were to be at liberty, subject to the provisions of the Act, to work the minerals; provided that no injury be done to the navigation. By another

clause, the owners were not to work the minerals without giving three months notice to defendants, who might inspect the mines, and might, if they thought proper, prevent the working of the mines, paying to the owners the value; on failure of defendants to inspect the mines the owners were authorized to work them.

Plaintiff was owner of mines under the canal, and gave defendants proper notice of his intention to work them: defendants did not inspect, and refused to purchase. Plaintiff proceeded to work the mines, without regard to the surface, and without attempting to support it, and knowing that the effect would be to let down the surface, and probably disturb the strata, and that there was danger of the water escaping from the canal into the mines; but, except as above, plaintiff did not work his mines in any negligent or unskillful or improper manner, but got the coal in the manner in which that vein of coal is ordinarily gotten, and without doing so he could not have obtained the full benefit of his coal. The canal was in good order when plaintiff commenced working his coal; and defendants did all they could to keep the canal watertight, by puddling, &c. During part of the time, while plaintiff's working was going on, they had dammed back the water, and so emptied the water out of that part of the canal; but they refused to do so for the three months necessary for plaintiff to work out his coal. The defendants were guilty of no actual carelessness in the management of their canal, unless it was carelessness to allow the water to be in it while the mines were worked. The result of the working was that the strata became dislocated, and the water of the canal escaped through the cracks and flooded the workings, and plaintiff was obliged to abandon his coal.

The plaintiff thereupon brought an action, charging that defendants, having brought water into the canal, so improperly managed the canal and the water, that it escaped and flooded plaintiff's mine. On the above facts, the Court having power to draw inferences:—

Held, by Cockburn, C.J., Mellor and Lush, JJ., that an action of tort could not be maintained.

4. *Semble*, by the same judges, that the plaintiff was entitled to compensation under the Act for the loss of his coal.

Hannen, J., being of a contrary opinion on both points. *Dunn* v. *Company of Proprietors of the Birmingham Canal.* 283

5. On the 28th of April, 1870, the plaintiffs retained the defendant, a patent-agent, to obtain for them letters-patent for "A new automaton vase or depôt for holding coals," and on the 30th a provisional specification was filed. Nothing more was done by the defendant until the end of August, when he gave notice of his intention to proceed with the patent, pursuant to s. 12 of 15 & 16 Vict. c. 83; and in October he applied for the fiat of the Attorney General for sealing the patent.

In the meantime, viz: on the 15th of June, 1870, one P. had, as the defendant was aware, filed a provisional specification for "Improvements in coal vases," which turned out to be substantially the same as the plaintiffs' invention, and had on the 10th of September obtained a grant of letters-patent for the same.

The Attorney-General rejected the plaintiffs' application, upon the authority of *Ex parte Bates* (Law Rep. 4 Ch. 577), where under similar circumstances the second applicant for provisional protection, in the absence of fraud, was held entitled to have his letters patent sealed, of which decision, though pronounced in May, 1869, the defendant was ignorant.

Held, that there was evidence of negligence on the part of the defendant. *Lee* v. *Walker*. 371

6. B., aged twenty-two, was employed by the defendants, the owner of a "factory" within the meaning of 7 Vict. c. 15, to grease the bearings between the fly and spur-wheel of a steam-engine in their engine-house. In order to do the work he had to stand on a wall 2 ft. 3 in. thick, in a cavity made for the purpose, into which he crawled through the spokes of the fly-wheel; the fly wheel being on his left hand revolving in a wheel race" in the engine house, and the spur-wheel on his right hand, revolving in another room in the factory. The distance between the spokes of the two wheels was 2 ft. 10 in. There was no fence along the wall edge of the wheel-race, on which B. was placed to do his work, and the fly-wheel, near to which, how

ever, children or young persons were not liable to pass or be employed, was unfenced. At the time of the accident, B. had been at work for five days. On the sixth morning, he was caught by the fly-wheel, whirled into the air and killed. At the trial of an action by his widow and administratrix for pecuniary loss sustained by his death, the jury found that he had not been guilty of contributory negligence, either in undertaking the employment, or whilst engaged upon it, and returned a verdict for the plaintiff. On a rule to set it aside, pursuant to leave, on the ground that there was no statutory duty to fence the place in question, and that the deceased had voluntarily encountered the risk incidental to his employment:—

Held, 1st, that the defendants were bound under 7 Vict. c. 15, s. 21, to fence the place where B. had to stand, it being the edge of a wheel-race not otherwise secured; and secondly, that the dangerous character of the employment was not so obvious as that he must necessarily be taken to have known it: or that, even assuming he did know it, that circumstance alone was not enough to constitute him a "volunteer" in such a sense as to exonerate the defendants from liability for the consequences of their breach of their statutory duty.

7. *Semble*, that the 7 Vict. c. 15, s. 21, imposed on the defendants an unqualified duty to fence the fly-wheel, whether children were liable to pass or be employed near it or not. *Britton Great Western Cotton Co.* 381

8. As to what is in allowing diseased animals to go at large, &c. 16 *note*

See CARRIER, 125.

NOTICE.

See AGENT, 490.
EXECUTORS AND ADMINISTRATORS, 468.
MORTGAGE, 437.

O.

OPTION.

See AGREEMENT, 658.

P.

PARENT AND CHILD.

See LUNATIC, 423, 426, *note*

PAROL EVIDENCE.

See WILL, 249, 260, 499.

PARTIES.

See TRUST, 538.
WILL, 664.

PARTY IN INTEREST.

See AGREEMENT, 432

PARTNERS.

See SERVICE, 566.

PATENT.

See NEGLIGENCE, 371.

PAYMENT.

See PRINCIPAL AND SURETY, 630.

PER CAPITA.

See LEGACY, 662.
WILL, 616.

PER STIRPES.

See LEGACY, 632.
WILL, 616.

PERFORMANCE.

See BREACH OF PROMISE OF MARRIAGE, 218, 225, *note*.

PERSONAL ESTATE.

When real, treated as such. 533

PIER

See TRESPASS, 51.

PRACTICE.

See CORPORATION, 323.
DISCOVERY, 450.

PRESUMPTION OF DEATH.

See LEGACY, 465, 467, *note*.

PRINCIPAL AND AGENT.

See AGENT.

PRINCIPAL AND SURETY.

1. The holder of a security who agrees with the principal to give time to the surety by so doing discharges the surety.

2. The holder of a security is, in dealing with the security, affected by knowledge acquired after taking the security as to which of the parties liable on the security is the principal and which is the surety.

3. A financial company, by agreement with an agent, accepted bills of exchange which were discounted for the agent by a discount company, the agent guaranteeing payment. The discount company were not at the time aware of the relations between the acceptors and the agent, but were informed before the bills matured that the agent was principal, and that the acceptors were sureties. After this the discount company agreed with the agent not to press the acceptors for payment until certain other bills became due:—
Held, that the acceptors were thereby discharged. *Oriental Financial Corporation* v. *Overend, Gurney, & Co.* 478, 490, *note*

4. *A.* having effected policies upon his own life with an assurance office, mortgaged them to the office as a security for successive loans. In one of these mortgages *B.* became surety for repayment of the amount borrowed. *A.* subsequently became bankrupt, and *B.* was compelled as surety to pay part of the debt.
Upon *A.'s* death:
Held, as against *A.'s* assignee in bankruptcy, that *B.* was entitled to marshall the securities so as to obtain repayment out of the balance of the several policy moneys of the amount which he had been compelled as surety to pay:

5. *Held*, also, that a payment to *B.* by *A.'s* wife, out of the income of her separate estate, to reimburse him for the loss he had sustained, was not a payment on account of or as agent of *A.*, so as to set free the policies *pro tanto* from *B.'s* claim. *Heyman* v. *Dubois.* 630

PUBLIC HIGHWAY.

See TRESPASS, 51.

PUBLICATION.

See INJUNCTION, 716.

R.

RAILWAY.

See CARRIER, 126, 269.
NEGLIGENCE, 283.
SPECIFIC PERFORMANCE 546.
STOPPAGE IN TRANSITU, 148.

RAPE.

See CRIMINAL LAW, 226, 230, *note.*

RATIFICATION.

See CORPORATION, 98.

REAL ESTATE.

When personal deemed, 533, 621.

REMAINDER.

See WILL, 22, 211, 672.

RENT.

See LANDLORD AND TENANT, 195.

REPLEVIN.

See LANDLORD AND TENANT, 26.

RETURN, RIGHT OF.

See SALE, 140, 148, *note.*

RIVER.

See TRESPASS, 51.

S.

SALE.

1. The plaintiff, on Monday, the 13th of March, 1871, bought a horse of the defendant, warranted to have been hunted with the Bicester hounds. By a condition of the contract he was to be at liberty to return the horse if it did not answer its description up to the Wednesday evening following the sale. Previous to removing it from the defendant's premises he was told by the groom who had charge of it, but who was not in the defendant's employment, that it had not, nor had it, in fact, been hunted with the Bicester hounds. The plaintiff, nevertheless, took the horse away. Whilst it was in his possession, though not through any neglect or default on his part, it met with an accident which depreciated its value. He returned it before the Wednesday evening, and brought an action to recover the price he had paid for it :—

Held, first, that the plaintiff's conduct in removing the horse after the information given him by the groom did not deprive him of his right under the contract to return the horse; and, secondly, that his right to return it was unaffected by an accident having happened to it whilst it was in his possession, without neglect or default on his part. *Head* v. *Tattersall*, 140, *note* 148

2. The plaintiffs agreed with the defendant to ship on board a vessel a cargo of fresh-water ice, and to despatch the vessel with all speed to any ordered port in the United Kingdom, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof, the purchaser takes upon himself all risks and dangers of the seas;" and the defendant agreed to buy and receive the ice on its arrival, and pay for it in cash on delivery, at the rate of 20*s.* a ton of 20 cwt., weighed on board during delivery. The vessel was lost during the voyage by risks and dangers of the seas, within the meaning of the agreement, and after the receipt by the defendant of the bills of lading. The plaintiffs having brought an action against the defendant to recover the value of the cargo :—

Held, reversing the judgment of the Court below, that the plaintiffs were entitled to recover.

Castle v. *Playford.* 204

3. Of goods to arrive. 46, *note*

See AGREEMENT, 42.
STOPPAGE IN TRANSITU, 148.

SERVICE.

1. In a suit against five partners, three of whom had entered appearance and the other two were out of the jurisdiction and had not, substituted service of a notice of motion for an injunction, and for the appointment of a receiver on any of the three partners for the two, was allowed. *Leese* v. *Martin.* 566

SHERIFF.

1. The plaintiff, an execution creditor, delivered a writ of fi. fa. to the sheriff, who proceeded to execute it by seizing goods upon the premises and apparently the property of the execution debtor, but which were then, in fact, in possession of the holder of a bill of sale to whom they had been previously assigned. The sheriff remained on the premises until dismissed by the plaintiff's attorney, and, being directed to return the writ, made a return, that he had seized goods of the debtor and kept them until ordered by the plaintiff's attorney to withdraw from possession. To an action brought by the plaintiff against the sheriff for not levying under the writ, and for a false return, the defendant pleaded (*inter alia*), *nulla bona*, and at the trial, set up, as his sole defence, the bill of sale, which the jury found to be valid; and a verdict was entered for the defendant:—

Held, that actual damage was necessary to support the action; that the defendant was not estopped by his return from proving that the goods seized did not belong to the debtor; that as they were found to be the property of the assignee they were not available for sale under the execution; and that, therefore, the plaintiff had sustained no damage from the conduct of the sheriff, and could not maintain the action. *Stimson* v. *Farnham.* 60

SHIPPING.

See CARRIER, 269.
GENERAL AVERAGE, 182.

SPECIFIC PERFORMANCE.

1. An agreement was entered into between a railway company and a landowner, part of whose land had been, under another agreement, taken by the company, whereby, in consideration of the previous withdrawal by the landowner of a Petition to Parliament against the company's bill, the company agreed to construct and forever maintain at their expense a siding of specified length alongside the line upon land belonging to the landowner, and to be provided by him for that purpose, for the use and to the reasonable satisfaction of the landowner:—

Held, that this agreement was not incapable of being enforced by a Court of Equity.

2. The Court will not refuse to decree specific performance of an agreement, although the plaintiff may have a concurrent remedy in damages, or may have entered into a negotiation for a money compensation which has failed. *Greene* v. *West Cheshire Railway.* 546

3. When the Defendant had agreed to execute to the Plaintiff a mortgage of certain leasehold premises in the usual form, containing an absolute power of sale, in consideration of money due, and had, when requested to do so, failed to execute such mortgage:—

The court made a decree for specific performance. *Ashton* v. *Corrigan.* 565, 566, *note*

4. A sale was made by the Court of Chancery under conditions which precluded the purchaser from objecting to the title prior to the document chosen as root of title, and made recitals in deeds more than twenty years old conclusive. A recital covered by this condition was so framed as to conceal a defect of title prior to the date fixed for commencement of title. The purchaser inquired into the prior title, and refused to complete on the ground that the prior title was bad; and the Court being

of opinion that such objection was well founded:—

Held, that, the sale being by the Court, the purchaser was not precluded by the conditions from raising the objection, and ought to be discharged from his purchase.

5. Whether a similar decision would be given in the case of an ordinary sale, *quære*. *Else* v. *Else*. 645

See FRAUDS, STATUTE OF, 640.
LUNATIC, 508.
WILL, 415.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STAYING PROCEEDINGS.

See FORMER SUIT, 724.

STOCKHOLDERS.

When subscription obtained by fraud. 567, 611, *note*.

See CORPORATION, 98.

STOPPAGE IN TRANSITU.

1. A company sold goods, alleged to be for exportation, to one Adams, for 205*l*., and took in payment 68*l*. in cash, and his acceptance for the residue. By his direction they forwarded the goods by the defendants' line to the plaintiff at Liverpool, who was alleged by Adams to be his shipping agent. Afterwards, having reason to suspect the solvency of Adams, they directed the defendants to stop the goods in transitu, but this message did not arrive at Liverpool until after the transitus had been determined. The defendants afterwards, at the request of the company, returned them the goods. No act avoiding the contract on the ground of fraud was done by the company until plea in this action.

The plaintiff having brought an action against the defendants for the goods, the defendants pleaded fraud in Adams, to which the plaintiff was privy. At the trial, the jury found that Adams obtained the goods with the intention of not paying for them; that the plaintiff had advanced to Adams a sum of 250*l*. (out of which the 68*l*. was paid), but that the advance was not bona fide; and that at the time he advanced it he knew of the fraudulent intention of Adams. The judge directed a verdict for the defendants with leave to amend; and with leave to the plaintiff to enter the verdict for him for 205*l*., if the Court should think that the defendants were not entitled to the verdict, either on the pleas as they stood, or upon any possible amendment thereof.

The Court below having made absolute a rule obtained by the plaintiff to enter a verdict for him:—

Held, (reversing the judgment of the Court below), that the defendants were entitled to retain their verdict; for that an equitable plea would be good which stated that the goods had been sold to Adams and delivered by the company to the defendants for the purpose of being delivered to the plaintiff under a contract induced by the fraud of Adams, to which the plaintiff was privy; that the company, under a mistaken supposition that the transitus was still subsisting, obtained from the defendants the re-delivery of the goods to them, which was a breach of the contract between the defendants and the plaintiff; but that afterwards, and after action commenced, the company having discovered the fraud, and that the plaintiff was privy to it, did elect to rescind the contract, and revest the property in the goods in themselves, and that this was done before any act was done by them affirming the contract, or otherwise determining their election; that no interest had vested in any innocent person rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit for the purpose of obtaining in damages from the defendants on the record and the company, who were the real defendants, the value of the goods thus revested in the company.

2. *Held*, also, that, although in an action by Adams against the company it might have been necessary in pleading a similar plea to have brought into court the money paid by him to them, it was not necessary in this action either to bring the money into

court, or to aver readiness and willingness to return the money, inasmuch as Adams was not a party to the action. *Clough* v. *London and North Western Railway.* 148

SUBSCRIBING WITNESS.

See WILL, 238.

SURETY.

See PRINCIPAL AND SURETY, 478, *note* 490, 630.

SURVIVORS.

See WILL, 415.

T.

TENANTS IN COMMON

See WILL, 537, 535, 616.

TESTAMENTARY GUARDIAN.

See WILL, 538.

TITLE.

See LANDLORD AND TENANT, 26 SALE, 204.

TRADE MARKS.

1. A firm of forwarding agents in *London* received from correspondents abroad several boxes of cigars bearing forged brands, which were to be delivered to several persons in *England*. On application by the makers whose brand had been forged, the agents gave information as to the consignors, and offered either to send back the cigars or to erase the brands. *Held* (affirming the decree of the Master of the Rolls), on a bill for injunction filed by the makers whose brands were forged, that the fact of the agents being merely carriers was no defence to the suit, but that as they had given sufficient information, and offered to erase the brands, they were not to pay costs.

2. The Appellant gave notice to a respondent whose costs the Appellant had been ordered to pay, that no alteration in the order as to his costs was asked for, and offered to pay his costs.

3. *Held*, that the Respondent was not entitled to his costs of appearing on the appeal. *Upmann* v. *Elkan.* 474

TRESPASS.

1. The plaintiff was the owner of the soil forming the bed of a navigable lake, and also of a pier which had been thereon erected wrongfully by a third person. The defendants, in common with the public, had the right of navigating the lake, and were the lessees, from the person who erected the pier, of the land adjoining that part of the lake where the pier was erected, and therefore had a right to embark and disembark, at the land leased by them, passengers using the defendants' boats on the lake. The pier was maintained by the plaintiff, and from its position prevented the defendants from getting with their boats to the land leased by them when landing and taking on board passengers :—
Held, that the defendants were justified in causing passengers to pass and re-pass over the pier between their boats and the land leased by them. *Marshall* v. *Ullswater Steam Navigation Co.* 51

TRUST AND TRUSTEE.

1. A testator by his will desired his trustees to give up his farm to his nephew, the Plaintiff, if the landlord would accept him as tenant ; and in that case he bequeathed to him the farming stock. He also gave some real property to the Plaintiff, and gave legacies and annuities to the

Plaintiff's father, mother, and sisters, and other persons, including the trustees. One of the trustees of the will was steward to the landlord. There were hardly any assets to pay the legacies and annuities if the Plaintiff took the farming stock, upon which the trustees represented the case to the landlord, who left it to their decision whether the Plaintiff should be accepted as tenant. They accordingly refused to let him be accepted, unless he executed a deed making over the devised real estate to pay the legacies and annuities :—

Held (affirming the decision of the Master of the Rolls), that it was a breach of trust on the part of the trustees to endeavor to induce the landlord to refuse his consent to the Plaintiff having the tenancy, which the testator had by his will expressed his wish for him to have; and that the deed, having been obtained by means of that breach of trust, must be set aside; and that the trustees, having made the suit necessary, and hostilely contested the Plaintiff's right to relief, must pay the costs of the suit. *Ellis* v. *Barker*. 460

2. The Court has power, under the 32d section of the *Trustee Act*, 1850, to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent.

3. *Semble*, a power in a settlement to appoint a new trustee in the place of a trustee incapable to act applies to personal incapacity, and not to simple residence abroad. *In re Bignold's Trust*. 506

4. By a marriage settlement lands were conveyed to trustees to the use of all the children equally, and his, her, and their heirs and assigns, with power of sale, and a direction that the proceeds should be laid out in the purchase of other lands, or on government or real securities, which, when purchased, should be made liable to the same trusts, estates, and limitations as were declared of the trust premises. The lands were sold and the proceeds invested on mortgage :—

Held, that the proceeds of the sale must be treated as personalty and not as realty. *Atwell* v. *Atwell*. 533

5. A testator died in 1810 in *India*, having bequeathed his English property to two infants, whom he acknowledged as his natural children; and having appointed his nephew, *D. E.*, to be their guardian. Part of his property consisted of a bond, dated in 1810, in which he was obligee, the obligor being seised of real estate in *Ireland*. In 1811 *D. E.* obtained possession of the bond from the testator's executor; but he did not register it, nor did he (as it was stated and admitted on demurrer) ever take any steps towards realizing the security. In 1821 the elder of the infants attained twenty-one; in 1832 she married; and in 1833, when (as alleged and admitted on demurrer) the bond had become irrecoverable, *D. E.*, for the first time, informed the elder child and her husband, who were co-Plaintiffs, of the existence of the bond; and upon finding it was then too late to register it, he handed it to the male Plaintiff, directing him to see to it.

No step was taken until *D. E.'s* death in 1870, after which, in 1871 the bill was filed, seeking to make *D. E.'s* estate liable as for a breach of trust. At this time the younger infant was dead, and had no legal personal representative; but his son, who was entitled to administer, was made a Defendant.

6. *Semble*, *D. E.* was not at any time liable for any breach of trust; but if he was :—

7. *Held*, That the Plaintiffs, by acquiescing for thirty-eight years, and waiting till *D. E.'s* death, had lost their right to make any claim against his estate; and demurrer to the bill allowed.

8. *Quære*, whether the bill was not defective for want of parties. *Sleeman* v. *Wilson*. 538

See MARRIED WOMEN, 262.
WILL, 588, 621.

U.

ULTRA VIRES.

See CORPORATION, 98.

USAGE.

When evidence of admissible and when not, 41 *note*.

See AGENT 32, 335, 651.

V.

VARIANCE.

CRIMINAL LAW, 391.

VENDOR AND VENDEE.

See AGREEMENT, 42, 177, 191, *note*.
GOOD WILL, 711.
INJUNCTION, 670.
SALE, 140, 148 *note*, 204.
STOPPAGE IN TRANSITU, 148.

W.

WARRANTY.

See COVENANT, 47.
INSURANCE MARINE, 120.
SALE, 140, 148 *note*.

WILFUL.

See CRIMINAL LAW, 408, 408 *note*.

WILL.

1. A testator devised an estate, of which he died seised in fee, to his brother, W. H., for life, and after the decease of W. H., to the four sons of W. H., his nephews, for life as tenants in common; and after their decease he devised the share or shares of his said nephews respectively to their respective eldest sons, then living for life; and after the decease of such eldest sons to the first and other sons of the latter successively in tail male. In default of issue of the eldest sons, he devised the same share or shares to the second, third, and other sons, then living, of his said nephews severally and successively, according to their respective seniorities, and to their issue in tail male in the same manner and for the same estate and estates as he had before given to the eldest sons of such nephews. Failing the issue of the sons then living, he devised to all and every the sons of his nephews hereafter to be born in tail male. After which the will proceeded thus: "And for default of such issue, I give and devise the same to my own right heirs for ever, it being my will and intention that the said lands shall go and remain in my name and family for ever, or so long as the law will permit such enjoyment of the same":—

Held, that the clause in favor of the heirs general did not take effect so long as any issue of any of the devisees capable of taking as tenants in tail survived, and that cross remainders were to be implied in favor of surviving tenants in common. *Hannaford* v. *Hannaford*. 22

2. By a will, dated before 1838, the testator gave lands to his wife without words of limitation. He also made her executrix and general legatee. And (1) he provided that if his wife should marry again, an inventory should be taken of all the land, goods, &c., before mentioned by certain persons, whom he appointed guardians of his children, with power to take away the goods, &c., and to "reserve" them and the land for the benefit of his children, until the two youngest should have arrived at an age capable of providing for themselves, and then to sell the whole, and divide the proceeds equally amongst his surviving children; (2) he directed that "my executrix shall pay my eldest son W. P. the sum of 5*l*. a year for wages so long as he shall continue to labor on the farm after my decease:"—

3. *Held*, affirming the judgment of the Court below, that the widow took the fee.

By Cockburn, C.J., Willes, and Grove, JJ., on the ground that clause

1 disclosed an intention that she should take the fee, subject to the limitation over on her marrying again.

By Blackburn, J., on the ground that the direction to pay 5*l.* a year to W. P. in clause 2 enlarged the estate to a fee.

By Mellor and Brett, JJ., on both grounds. *Pickwell* v. *Spencer*. 211

4. The deceased executed his will in the presence of two witnesses, who signed their names in his presence, one opposite the word "executors," the other opposite the word "witness." There was no attestation clause to the will. The deceased intended one of the witnesses to be his executor, and asked him to sign his name in that character.

The Court held, that such person did not sign the will exclusively as executor; but that he also intended by his signature to affirm that the deceased executed the will in his presence, and that consequently the execution was valid. *Griffiths* v. *Griffiths*. 236

5. The deceased, by his will, appointed his wife sole executrix, and in default of her, two other persons to be executors. The wife took probate, and died:—

Held, that such other persons were, on the death of the wife, entitled to administer the estate of the deceased as substituted executors. *Foster's Goods*. 240

6. The testator appointed as his executor his son Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter.

The Court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him. *Charter* v. *Charter*. 249, and *note*, 260

7. It would seem that in such a case the Court may receive parol evidence of the intention of the testator. *Charter* v. *Charter*. 249, and *note*, 260

8. *F.* and *L.* were partners entitled in equal shares. Part of the assets consisted of leasehold premises vested in them as joint tenants, in which the business was carried on. *F.*, by his will, bequeathed to *L.* "all my share of the leasehold premises in which my business is carried on." After *F.'s* death the assets of the partnership proved insufficient to pay the partnership debts, though *L.* and the estate of *F.* were amply solvent. *L.* bought the share of *F.* in the leasehold premises, without prejudice to his rights under the bequest; and a certificate having been made in a suit for the administration of *F.'s* estate, showing that it was solvent, *L.* presented a petition to have it declared that the effect of the bequest was to give him a moiety of the leasehold, exonerated out of *F.'s* estate from the partnership debts, and for the return of the purchase money which he had paid:—

Held (reversing the decision of *Stuart*, V. C.), that the bequest only gave such interest in the leasehold as *F.* had, namely, a right to a moiety subject to payment of the partnership debts; and that as the partnership debts exhausted the assets the bequest failed. *Farquhar* v. *Hadden*. 409

9. A testator gave his estates to trustees upon trust to pay the rents to his two daughters (both then unmarried) in equal shares during their respective lives "independently of the control of any husband or husbands with whom they or either of them might happen to intermarry;" and after their respective decease, upon trust to convey the estates "unto and equally between the respective husbands of them, my said daughters, to hold to them respectively, and their respective heirs and assigns;" with a proviso, that if either of his daughters should "depart this life unmarried," her share should go to the survivor for her life, and on her decease the whole should be conveyed to the husband of the surviving daughter. Both daughters married. One died in the lifetime of her husband. Then the husband of the other died, having devised his interest in the estate to his wife absolutely:—

Held (reversing the decision of *Wickens*, V.C.), that the surviving daughter could make a good title to a moiety of the estate; for that a gift to an unmarried woman for life, with remainder in fee to her husband gives an indefeasibly vested remainder in fee to her first husband. And

that, as the question turned on a general rule of construction, unaffected by any special context in the will, the title would be forced on a purchaser. *Radford* v. *Willis*. 415

10. A testator, by his will, gave his property to his wife for life, and after her death equally between his children, subject to a proviso directing that his trustees should deduct from the share of his daughter *M. B.*, the sum of £200 which he had advanced to her, and add it to his personal estate; and that if, at the period of distribution, *M. B.* "should be indebted to any or either of her brothers or sisters in respect of advances made to her, his trustees should be empowered to deduct all or any such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing." *M. B.* had borrowed from one brother £100, on a promissory note bearing interest, and had borrowed other sums from another brother. Nearly all these debts had, before the time of distribution, become barred by the *Statute of Limitations*:—

Held, by the Vice-Chancellor of the Duchy Court of *Lancaster*, that the trustees were authorized to deduct from *M. B.'s* share all the debts, though barred by the statute, with the interest on such as carried interest:—

11. *Held*, on appeal, that the decree was right so far as regarded the principal of the debts, though barred by the statute; but that the intention of the testator was to put advances by brothers and sisters on the same footing as advances by himself, and that interest, therefore, ought not to be deducted. *Poole* v. *Poole* 419 and *note* 422

12. A testatrix, by will made in 1868, gave a legacy to "the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of *Worcester*, to be applied by him for the benefit of that charity." Two societies made a claim. One had been founded in 1777 for the relief of the widows and orphans of the clergy of the diocese, at which time the diocese comprised only the Archdeaconry of *Worcester*. In 1837 the Archdeaconry of *Coventry* was added to the diocese, and in 1848 the *Worcester* society altered its title, so as to show that its operations were restricted to the archdeaconry of *Worcester*. The other society had been founded in 1777 for the relief of widows and orphans of clergy in the Archdeaconry of *Coventry*. The father of the testatrix had been a subscriber to the *Worcester* society till his death in 1817. His widow had continued the subscription till her death in 1860, and the testatrix had continued it from that time at an increased rate; but it did not appear that the testatrix, or any of her family, had subscribed to the *Coventry* society:—

Held, by *Malins*, V.C., that the gift was to be treated as a gift to an object, not to a particular society, and must be apportioned between the two societies:

13. *Held*, on appeal, that the gift was a gift to a particular society, with a slight inaccuracy of description, and that the *Worcester* society was solely entitled. *In re Kilvert's Trust*. 499

14. A gift in trust for "all and every the child and children" of *A.* and his, her, and their executors, administrators, and assigns, for his, her, and their own absolute use and benefit:—

Held, to create a joint tenancy. *Morgan* v. *Britten*. 537

15. A testator cannot by will lawfully appoint any one to be guardian of his illegitimate children. *Sleeman* v. *Wilson*. 538

16. A testamentary guardian is a trustee of such property as comes to his hands in that character. *Sleeman* v. *Wilson*. 538

17. A testator in 1803 devised estates to his eldest son *R.* for life, with remainders to his grandson *R.* for life; to trustees to preserve contingent estates; to other trustees for 500 years upon certain trusts; to the first and other sons of his grandson *R.* in tail male; and in default of issue, to the second and other sons of his son *R.* in tail male; and in default of issue to his son *N.* for life; to the same trustees to preserve contingent estates; to the first and other sons of *N.* in tail male; with remainders over in favor of other sons for life and their issue in tail.

The limitation of the term was for the purpose of enabling the trustees, by mortgage or otherwise, in case any

one or more of the testator's younger sons, or their issue, should become seized in possession by virtue of the limitations of the estates devised to his son *R.* for life, with remainders over, to raise a sum of £5000 for the benefit of such of the testator's sons (except the son in possession of the estates) as should be then living, or their issue.

The testator's eldest son had no son other than the testator's grandson *R.*, who died on the 24th of February, 1870, without issue, and the estates devolved upon the infant Defendant, a grandson of the testator's son *N.*

The Plaintiffs were a younger son of *N.*, and the son of the testator's younger son *H.* :—

Held, on demurrer to a bill praying a declaration that according to the true construction of the will, and in the events which had happened, the sum of £5000 was validly charged upon the estates, and was now raiseable with interest at 4 per cent. from the 24th of February, 1870, that the charge failed for remoteness. *Sykes* v. *Sykes*. 555

18. Under a gift in a will to such of the nephews and nieces of *A.* and the children of *A.'s* deceased niece *B.* thereinafter named (then followed the names of the nephews and nieces and children of the deceased niece), as should be living at the time of the decease of the testatrix, to be divided between and among them *per stirpes* equally and not *per capita*, the children of *B.* taking between them only the equal share to which *B.* would have been entitled if named in that bequest instead of her children, and living at the time of the decease of the testatrix :—

Held, that the children of *B.* took as tenants in common. *Attorney General* v. *Fletcher*. 616

19. Testator appointed his "friend" *P.* his executor, and gave him a legacy "as a remembrance." *P.* did not act as executor :—

Held, that he was entitled to the legacy without proving the will. *Bubb* v. *Yelverton*. 619

20. A testator devised and bequeathed all his estate and effects to trustees, their heirs, executors, and administrators, upon trust to convert his personal estate, not being money, and to stand possessed of the money to arise by such sale, and of the rest and residue of his estate and effects upon trust to invest the same in Government or real securities, and to stand possessed of such investments upon trusts for the benefit of the widow and children and brothers and sisters of the testator :—

Held, that the real estate of the testator passed to the trustees, but that the beneficial interest therein was undisposed of by the will, and consequently resulted to the testator's heir. *Longley* v *Longley*. 631

21. A testatrix having a power under a marriage settlement to appoint certain shares of real estate made an appointment to her husband "in trust to stand possessed thereof, and to enjoy the rents, profits, and income arising and to arise therefrom for his own absolute use and benefit, for and during the term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after the decease of my said husband," over :—

Held, that the husband took a life interest with a power of appointment, and that, on his death without having exercised the power, the gift over took effect. *Pennock* v. *Pennock*. 626

22. *S. D.*, who had, under the will of her late husband, a general power of appointment over a moiety of his residuary estate, by will, in 1869, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate, which she had any title to or interest in, unto her brothers and sisters *M.*, *E.*, *W.*, and *J.* equally, and appointed an executor.

M. and *J.* died in the lifetime of the appointor :—

Held, that the next of kin of the husband were entitled to the shares which *M.* and *J.* would have taken if they had survived the appointor. *In re Davis's Trust*. 635

23. Testator, after giving a life annuity, from and after the death or marriage of his sister-in-law, in trust for his nephew, her son, bequeathed the residue of his mixed real and personal estate specifically in favor of his nieces, their husbands, and children. He then declared that "for making a further provision for the maintenance of" his above-mentioned nephew, it

should be lawful for his trustees, during the life of his sister-in-law upon her request in writing, to expend any sums not exceeding £6500 in the purchase of a commission for, or in obtaining the promotion of, his nephew in the army.

After the testator's death the nephew, being in the army, exchanged from one regiment into another, and in so doing paid £600 for the exchange, and £550 for horses and outfit; after which, in May, 1868, his mother signed and sent a formal request to the trustees, desiring that the whole of the £6500, with interest from the day of the date of the request, should be raised out of the residuary estate, and paid to her son.

From and after the 1st of November, 1871, purchase of commissions in the army was by royal warrant abolished:—

Held, that the nephew was entitled to the full sum of £6500, with interest at 4 per cent. from the date of the request, subject to the payment of legacy duty.

24. Since the filing of a special case affecting property to which certain infant Defendants were entitled, another child in the same interest had been born.

25. The Court, at the hearing, dispensed with the presence of the newly-born child. *Palmer* v. *Flower*. 664

26. A testator, having purchased a piece of land, opened it as a brick-field, and it was open at his death. By his will he devised it to trustees upon trust to sell "when, in their discretion it may seem advisable;" and he directed that the rents "and profits," should, until sale, be considered as part of his personal estate, and be applicable and applied in such manner as the dividends or interest to arise from the investments of the sale moneys. He then gave the income of the investments to a tenant for life, with remainder, as to the capital, over.

Royalties became payable after the testator's death. The trustees did not sell for ten years, but allowed the brick-field to be worked out, being of opinion that by holding the land for the present they might sell it at a higher price afterwards for building purposes:—

Held, that the tenant for life was entitled to the royalties absolutely, and not merely to the income which they would have produced, if invested. *Miller* v. *Miller*. 672

27. *H. F. C.*, who died in 1862, by will gave real estates to trustees upon trusts for his wife for life, and, after her decease, for the benefit of his unmarried daughters. He gave power to the trustees after the decease of his wife, or the decease or marriage of all his daughters, or earlier, with the consent of his wife, or if she should be dead, of his unmarried daughters, to sell the estates; and they were to invest the moneys and to pay the income to his wife for life, and, after her decease, to divide the principal moneys amongst such of his daughters as should be living at his decease, equally, as tenants in common. He left five daughters surviving. *L.*, one of them, in 1858, married *W.*, and *L.*, another of them, in 1858 married *H.* By the settlement made on the marriage of *I.* and *H.* she assigned to trustees certain trust funds and premises upon trusts during their joint lives to pay the income to her for her separate use, and, after the decease of either, to pay it to the survivor for life, and after the decease of the survivor upon trusts for the benefit of the children or remoter issue, as they should jointly appoint; and in default of such appointment, as the survivor should appoint; and in default, for the benefit of the children equally. The settlement contained a covenant by the husband and wife, that if, at any time after the marriage, and during their joint lives, they, or either of them in her right, should by gift, descent, succession, or otherwise, become entitled to any real or personal estate, property, or effects of the value of £100 or upwards, at any one time, the same should be conveyed, transferred, assured, and paid to the trustees upon the trusts declared. The testator's estates were, in 1867, with the consent of his widow, sold by the trustees, and they invested the proceeds in *East India Government Stock*. The widow died in April, 1871, leaving *I.* and *H.* surviving.

By the settlement made on the marriage of *L.* and *W.*, she assigned to trustees certain trust funds and personal estate upon trusts similar to those, and there was a covenant similar to that contained in the settlement of *I.* and *H. L.* died in January, 1865, without having concurred in exercis-

ing the joint power of appointment. *W.* died in January, 1871. By will he appointed the trust funds and personal estate settled by his late wife.

The trustees of *H. F. C.'s* will sold the stock, and paid into Court, to a credit in *I.* and *H.'s* matter, the sum of £2200 18*s.*; and *I.* and *H.* by their Petition, prayed that it might be paid to *H.* The same trustees paid into Court, to a credit in *L.* and *W.'s* matter, a similar sum and some apportioned dividends; and the two surviving trustees of *L. & W.'s* settlement (who were also two of the trustees and executors of *W.'s* will), and the children of the marriage, by their Petition, prayed that it might be paid to the trustees of the settlement:—

Held, that "entitled" must be read "entitled in possession," and therefore that the fund in *I.* and *H.'s* matter was bound by the covenant, and must go to the trustees of the settlement, the required change in the property having taken place during the coverture; and that the fund in *L.* and *W.'s* matter was not bound by the covenant, and must go to *W.'s* legal personal representatives, there having been no change in the property during the coverture. *In re Clinton's Trusts.* 491

28. Testatrix by her will gave a share of her residuary real and personal estate to *B.*, and one of the attesting witnesses to the will was *B's* wife. By a codicil, which was attested by other witnesses, testatrix, after a direction to her executors to allow an extended time for payment of a debt due to her from one of her legatees, confirmed her will in other respects:—

Held, that the duly attested codicil had the effect of republishing and incorporating the will so as to render the gift to *B.* valid, notwithstanding attestation of the will by *B.'s* wife *Andersen* v. *Anderson.* 730

See MARRIED WOMAN. 426.

WITNESS.

See CRIMINAL LAW, 226, 230, *note* WILL, 236.

WOUNDING.

See CRIMINAL LAW, 403.